Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1977

ALYESKA PIPELINE SERVICE COMPANY, *Petitioner*

v.

THE WILDERNESS SOCIETY, FRIENDS OF THE EARTH AND ENVIRONMENTAL DEFENSE FUND, INC., *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Alyeska Pipeline Service Company ("Alyeska") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on April 4, 1974.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, pp. 1a-40a) is not yet reported. There is no opinion of the district court, as the attorneys' fee questions here presented were addressed to the court of appeals in the first instance.

An earlier opinion of the court of appeals (addressed to the merits of the case) is reported at 479 F.2d 842 (1973). This Court denied petitions for a writ of certiorari to review that decision, 411 U.S. 917 (1973).

JURISDICTION

The order of the court of appeals (App. 41a) was entered on April 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in order to encourage lawsuits challenging governmental action, the right to recover attorneys' fees under the private attorney general doctrine should be extended to all cases in which compliance with a federal statute by a federal official is successfully challenged, even though the statute does not reflect a policy which Congress considers of high priority.

2. Whether the doctrine can be so extended to award attorneys' fees: (a) with respect to issues on which the attorneys do not succeed, (b) in excess of the amounts paid to the attorneys by their clients, and (c) against a private party which has no control over the actions complained of.

3. Whether, in an action against a federal official, taxing a private intervenor for attorneys' fees of the plaintiffs in order to promote an alleged public purpose is consistent with the Fifth Amendment's prohibition against the uncompensated taking of private property for public use.

STATUTES INVOLVED

The decision of the court of appeals with respect to attorneys' fees was purportedly based on the equitable power of the courts and, accordingly, no statute is directly relevant.

STATEMENT

On March 26, 1970, respondents The Wilderness Society, Friends of the Earth and Environmental Defense Fund, Inc., filed an action for declaratory and injunctive relief in the U.S. District Court for the District of Columbia. The complaint sought to prevent the Secretary of the Interior from granting a right-of-way and contiguous special land use permits across public lands and issuing other necessary authorizations for construction of the trans Alaska pipeline. Only the Secretary was named as a defendant. (Petitioner Alyeska and the State of Alaska did not seek and obtain leave to participate as intervenor-defendants until 18 months later.)

Respondents' complaint stated two distinct claims: (1) that the Secretary had not at that time satisfied the requirements of the recently-enacted National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. § 4321 *et seq.*), and (2) that the Secretary lacked the power to issue the requested authority because the request exceeded the 54-foot limitation on width of right-of-way contained in section 28 of the Mineral Leasing Act of 1920 (41 Stat. 449; 30 U.S.C. § 185).

On April 23, 1970, the district court entered a preliminary injunction against the Secretary. This injunction remained in effect while the Department of the Interior completed an exhaustive analysis of the environmental impact of the proposed pipeline.

A draft environmental impact statement was published by the Department in January 1971. Public hearings were held and thereafter investigation, research and analysis continued for more than a year. The final environmental statement was released on

March 20, 1972. The statement, consisting of six volumes accompanied by three volumes of economic and national security analysis, cost $9 million to prepare and was far the largest and most comprehensive environmental impact analysis which had been made by any agency of the Federal Government.

Following release of the statement, public comments were invited, received and analyzed. Finally, on May 11, 1972, the Secretary announced his decision to issue the authority necessary for construction of the pipeline and explained his decision in a 45-page statement of reasons.

Proceedings in the district court were then reactivated. A second action which had been filed by Cordova District Fisheries Union (hereafter "Cordova") was consolidated with the action filed by respondents. On August 16, 1972, following briefs and a plenary hearing, the district court entered its decision, finding that the environmental impact statement fully complied with the National Environmental Policy Act ("NEPA") and that the proposed action by the Secretary was consistent with the Mineral Leasing Act and other federal statutes and regulations. Accordingly, the court dissolved the preliminary injunction, denied the requests for a permanent injunction, and dismissed the complaints.

On expedited appeal, the Court of Appeals for the District of Columbia, sitting *en banc*, upheld defendants' position with respect to state road permits, pipeline pumping stations and certain other facilities, but ruled that section 28 of the Mineral Leasing Act barred the Secretary from issuing to Alyeska the special land

use permit for temporary use of contiguous lands outside of the 54-foot permanent right-of-way for the pipeline. With respect to respondents' other claim for relief, by a vote of 4 to 3, the court declined to reach the NEPA issues. The dissenting judges argued that the requirements of NEPA had been satisfied and that the court had an obligation to decide the NEPA issues at that time. 479 F.2d 842 (1973). This Court denied certiorari, 411 U.S. 917 (1973).

Almost immediately after this Court's action, bills were introduced in Congress to reverse the result of the court of appeals' decision. On November 16, 1973, Congress enacted amendments to the Mineral Leasing Act which gave the Secretary express authority to issue all of the permits in question. In addition, Congress *directed* the Secretary to issue the permits and take all other necessary steps for construction of the pipeline. Congress also specifically provided that no further action under NEPA would be required. And Congress enacted a provision prohibiting (except for constitutional questions) further judicial review of government actions in connection with the pipeline. P.L. 93-153, 87 Stat. 577 *et seq.* (Nov. 16, 1973).

While Congress was considering legislation to deal with the court of appeals decision, respondents and Cordova filed bills of costs with the court of appeals. Respondents and Cordova alleged that it was appropriate to file their bills of costs in the court of appeals rather than the district court because the latter had "acted merely as a conduit . . . ." Respondents requested an award of expenses and compensation for 4455 hours of attorney time in connection with both the court proceedings and respondents' submission to the

Department of Interior of comments on the impact statement.[1]

Following briefs and oral argument, the court of appeals, again sitting *en banc*, decided by a vote of 4 to 3 that an award of both expenses and attorneys' fees was appropriate and remanded the case to the district court to determine the amount of the attorneys' fees.

The majority found that respondents had acted in the public interest by prosecuting the suit and that, as a result, it was appropriate to award fees based on a "private attorney general" rationale. (App. 17a.) The majority also found that it was appropriate to award attorneys' fees for work on all issues in the case (including work related to the administrative process), even though respondents did not prevail on many of those issues. (App. 14a.) And the majority ruled that respondents' attorneys could be awarded the "reasonable value" of services rendered, even though such "value" may be substantially in excess of the amounts paid to them by the respondents. (App. 19a-21a.)

As to allocation among the defendants, the court of appeals decided that it would be "inappropriate" to tax attorneys' fees against the State of Alaska (App. 18a, n. 8),[2] but appropriate to assess 50 percent of respondents' attorneys' fees against the United States and 50 percent against the private party intervenor, Alyeska. (App. 19a.) However, recovery against the

[1] Cordova filed a more limited request, which was ultimately denied by the court of appeals and is not at issue here.

[2] The majority based this conclusion on the fact that Alaska also presented "public interest implications" of the pipeline. The majority, however, concluded that *expenses* "should be divided equally among Alyeska, the State of Alaska, and the United States." (App. 3a.)

United States was barred by 28 U.S.C. § 2412, so the burden of paying attorneys' fees fell solely upon the private party intervenor.

Three dissenting judges strongly disagreed. They said: that passage by Congress of the "Trans-Alaska Pipeline Authorization Act" (P.L. 93-153) made it clear respondents were acting *against* the public interest, not in furtherance of it (App. 32a); and that the majority decision, which permits recovery for issues upon which respondents did not prevail and which permits recovery in excess of the amounts actually paid or owed to counsel, is a "dangerous precedent" (App. 33a) which will give "new impetus" to the "flood of 'public interest' litigation, particularly in the environmental field . . . ." (App. 34a.) In addition, one judge pointed out that Alyeska should not "be held answerable for what the majority apparently perceives to be the sins of the Government" and that the real premise of the opinion is: "oil companies are prosperous, appellants are poor, and therefore oil companies should finance both sides of this litigation." (App. 31a.)

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Extending the "Private Attorney General" Exception is in Conflict with the Decision of Another Court of Appeals, Will Result in a Greatly Increased Volume of Litigation and Will Impede Government Decision-Making.

The court below expressly stated that its holding does, and was intended to, break new ground.

As this Court recently reaffirmed, "the so-called 'American Rule' governing the award of attorneys' fees in litigation in the federal courts is that 'attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.'"

F. D. Rich Co. v. *United States*, — U.S. —, 42 U.S.L.W. 4783, 4786 (May 28, 1974). Two exceptions have been commonly recognized: (1) where there is vexatious or obdurate conduct by the party against whom fees are awarded, and (2) where there is a common fund produced by successful litigation.[3] Neither is applicable here.

The "private attorney general" concept had its origin in *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968). The case involved a statute (Title II of the Civil Rights Act of 1964)[4] which expressly authorized awards of attorneys' fees, but left such awards to the discretion of the court. This Court held that attorneys' fees should ordinarily be recovered in successful actions brought under Title II. In so ruling, the Court observed that a successful plaintiff under Title II obtains an injunction "not for himself alone, but also as a private attorney general, vindicating a policy that Congress considered of the highest priority." 390 U.S. at 402.

In some recent decisions (cited by the court below, *see* pp. 4a-5a *infra*), lower federal courts have extended the private attorney general rationale to grant fees without statutory authorization. This Court has not yet had occasion to rule on such extension, though the issue has been raised in four cases previously before the Court.[5] As the Court recently stated:

[3] *See, e.g.*, Bradley v. School Board of the City of Richmond, — U.S. —, 42 U.S.L.W. 4703, 4706 (May 15, 1974) (hereafter referred to as "Bradley v. School Board").

[4] *See* 42 U.S.C. § 2000a-3(b).

[5] *See* Bradley v. School Board, *supra*; F. D. Rich Co. v. United States, *supra*; Hall v. Cole, 412 U.S. 1, 6, n. 7 (1973); Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427, 429, n. 2 (1973).

> Th[e] "private attorney general" rationale has not been squarely before this Court . . . ; nor do we intend to imply any view either on the validity or scope of that doctrine. [*F. D. Rich Co.* v. *United States, supra*, 42 U.S.L.W. at 4788.]

The private attorney general doctrine is squarely before the Court in this case.

Other than the instant case, decisions in which lower federal courts have utilized the private attorney general rationale to award fees where there is no statutory authorization have been limited almost exclusively to civil rights and reapportionment cases—*i.e.*, lawsuits brought to protect fundamental rights expressed in civil rights legislation and the Constitution.[6] Like *Piggie Park*, they involved vindication of a "policy which Congress considered of the highest priority."[7] Further, as the Court of Appeals for the Fourth Circuit pointed out,[8] most decisions endorsing the private attorney

[6] *See, e.g.*, Sims v. Amos, 340 F.Supp. 691 (M.D. Ala. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971). The cases are collected in "*Comment: Court Awarded Attorneys Fees and Equal Access to the Courts*," 122 U. Pa. L. Rev. 636, 666-68 (1974). Prior to the instant case, the only extensions of the exception beyond civil rights and constitutional cases appear to be three district court decisions: Sierra Club v. Lynn, 364 F.Supp. 834 (W.D. Texas 1973) (NEPA), Calnetics Corp v. Volkswagen of America, Inc., 353 F.Supp. 1219 (C.D. Cal. 1973) (antitrust), and La Raza Unida v. Volpe, 57 F.R.D. 94, 98 (N.D. Cal. 1972) (housing relocation).

[7] "It is particularly in the area of desegregation that this Court . . . recognized that, by their suit, plaintiffs vindicated a national policy of high priority." Bradley v. School Board, *supra*, 42 U.S.L.W. at 4710, n. 27.

[8] Bradley v. School Board, 472 F.2d 318, 331 n. 56 (1972), *rev'd on other grounds*, — U.S. —, 42 U.S.L.W. 4702 (1974).

general exception have first found that one of the historic exceptions is applicable, and then added the private attorney general rationale as an alternative ground.

The decision of the court below goes substantially beyond prior decisions of other lower courts invoking the private attorney general doctrine. Under the decision, even where the traditional exceptions are admittedly inapplicable, a court may award attorneys' fees in any case where non-compliance with federal law by a federal official is found. No determination need be made that plaintiffs have vindicated a policy which Congress considered of high priority. Indeed, the provision which formed the basis for the court's decision here (the width limitation contained in section 28 of the Mineral Leasing Act of 1920) was sufficiently unimportant to Congress that it was not mentioned in any of the relevant committee reports[9] and was quickly amended following the court's decision here. Even the court of appeals characterized the width limitation as "anachronistic". (App. 11a.)

The court's rationale was that this case involves "the duty of the Executive Branch to observe the restrictions imposed by the Legislative . . . ." (App. 11a.) However, this rationale is equally applicable to *all* cases involving a misinterpretation or technical violation of a statute by a federal official. The result is that under the court's opinion, attorneys' fees may be allowed in

[9] H.R. Rep. No. 668, 63d Cong., 2d Sess. (1914); S. Rep. No. 947, 63d Cong., 3d Sess. (1915), H.R. Rep. No. 206, 65th Cong., 2d Sess. (1917); H.R. Rep. No. 563, 65th Cong., 2d Sess. (1918); S. Rep. No. 392, 65th Cong., 3d Sess. (1919); H.R. Rep. No. 398, 66th Cong., 1st Sess. (1919); H.R. Rep. No. 600, 66th Cong., 2d Sess. (1920).

virtually all cases in which compliance with federal law is successfully challenged.[10] In such a major extension, the exception could engulf the rule, a matter clearly justifying review by this Court.

The court below recognized that its holding was unprecedented and would have particular application to environmental lawsuits:

> In July of 1971 no circuit had yet ruled that . . . an award [of attorneys' fees] was proper on behalf

[10] The only other way to interpret the court's decision is that each court is to engage in essentially legislative judgments, picking and choosing among the thousands of federal statutes to select those which, in the judgment of the court, warrant an award of attorneys' fees in connection with their interpretation. Such a selective process is an inappropriate function for the federal courts. This approach was wisely rejected in *Bradley*, *supra*, where the Fourth Circuit pointed out that courts are ill-suited to make judgments as to which statutes are "important":

> If . . . attorneys' fees [are awarded] to promote and encourage private litigation in support of public policy as expressed by Congress or embodied in the Constitution, it will launch courts upon the difficult and complex task of determining what is public policy, an issue normally reserved for legislative determination, and, even more difficult, which public policy warrants the encouragement of award of fees to attorneys for private litigants who voluntarily take upon themselves the character of private attorneys-general. [472 F.2d 318, 329.]

See also, F. D. Rich Co. v. United States, *supra*, where the Court expressed a similar view on an analogous issue, concluding that it is "better to extricate the federal courts from the morass of trying to divine a 'state policy' as to the award of attorneys' fees in suits on construction bonds." 42 U.S.L.W. at 4787.

The danger of attempting to make determinations as to the importance of a particular policy is pointed up by the decision in this case. Four judges concluded that respondents had attempted to "vindicate" an important policy. Three judges concluded that, far from *vindicating* an important policy, "these plaintiffs have been *frustrating* the policy Congress considers highly desirable and of the utmost urgency." (App. 32a.)

> of "private attorney general" litigants in environmental suits successfully prosecuted in the public interest. Our circuit so rules for the first time today—in a 4 to 3 opinion. [App. 22a.]

The court also recognized that the impact of its decision would extend far beyond the particular case before it, and indeed far beyond "environmental suits"; the decision was viewed as stimulating all forms of "public interest" litigation:

> [O]ur decision today may increase the willingness of skilled lawyers throughout the nation to undertake public interest litigation on behalf of unmonied clients with just, lawful, and important claims. This proposition we of course accept, and count it a happy result of our decision. [App. 23a.]

While the majority considered this impact a virtue, the three dissenting judges pointed out the obvious danger and predicted a flood of unrestrained "public interest" litigation:

> With regard to other attorneys and potential plaintiffs, not so securely situated [as plaintiffs' attorneys here], the hope of attorneys' fees may be just the stimulus needed to launch them in the direction of the courthouse, unembarrassed by any humility as to their knowledge of where the "public interest" lies. The flood of "public interest" litigation, particularly in the environmental field, is given a new impetus by the majority decision. [App. 34a.]

It thus is clear that all seven judges who participated in the decision below viewed the decision as novel and of great importance to the direction and scope of so-called "public interest" litigation. A decision as far-

reaching as this, by a closely divided *en banc* court (4-3), is of such obvious importance to the administration of justice by all federal courts that review by the Supreme Court is plainly warranted.

Further, the decision is in conflict with that of the Court of Appeals for the Fourth Circuit in *Bradley* v. *School Board, supra*. In that case, the district court had found that because of the "obdurate" behavior of defendants, plaintiff's counsel should be awarded attorneys' fees. But the court had also found that fees were justified under the "private attorney general" rationale. The Fourth Circuit reversed the district court on both points. As to the award based on the "private attorney general" rationale, the court ruled that such awards could only be made if authorized by statute:

> Should the courts, in those instances where Congress has failed to grant the right [to an award of attorneys' fees], review the legislative omission and sustain or correct the omission as the court's judgment on public policy suggests? This, it seems to us, would be an unwarranted exercise of judicial power. [472 F.2d 318, 330.][11]

The court in this case noted the *Bradley* decision, observing that "at least one court has been reluctant to award attorneys' fees under a private attorney general theory . . . ." (App. 7a.) But the court rejected the *Bradley* rationale.

Thus, both because of the importance of the decision and the conflict between the circuits, this Court should grant a writ of certiorari.

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[11] As indicated above, the decision of the Fourth Circuit was subsequently reversed by this Court on other grounds; the Court did not reach the private attorney general issues.

2. The Decision of the Court of Appeals Extending the "Private Attorney General" Exception is in Error in Three Additional Respects.

a. The majority held that attorney's fees could be awarded even with respect to issues on which the attorneys do not succeed.

In the few cases adopting the "private attorney general" theory, the basis has generally been that the plaintiffs have *successfully* vindicated a policy of high priority and should be rewarded for it.[12] In this case the court ruled that attorneys' fees could be awarded for work on all issues in the case—NEPA as well as Mineral Leasing Act (App. 17a)—even though respondents were totally unsuccessful on all of the NEPA issues and some of the Mineral Leasing Act issues.[13] Indeed on the NEPA issues, the district judge and the three judges of the court of appeals who reached those issues ruled adversely to respondents, and Congress legislatively confirmed their judgments.

The court below rationalized its award by saying that even though respondents ultimately failed to achieve their objectives, their lawsuit assured "the

[12] *E.g.*, Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Stanford Daily v. Zurcher, 366 F.Supp. 18 (N.D. Cal. 1973); Wyatt v. Stickney, 344 F.Supp. 387 (M.D. Ala. 1972); NAACP v. Allen, 340 F.Supp. 703 (M.D. Ala. 1972); Sims v. Amos, 340 F.Supp. 691 (M.D. Ala. 1972). One exception is Sierra Club v. Lynn, 364 F.Supp. 834, 847 (W.D. Texas 1973).

[13] Ultimately, as the dissenting judges pointed out, attorneys for respondents were totally unsuccessful. "This stands as [respondents'] net achievement: the amendment of the 1920 Mineral Leasing Act to authorize a wider right-of-way, quite the opposite of the [respondents'] objective to limit the right-of-way to 25 feet on each side." (App. 33a.)

proper functioning of our system of government" (App. 17a) and "serve[d] as a catalyst to effect change" (App. 14a) in the form of additional study by the Department of Interior and additional legislation by Congress.

The three dissenting judges attacked the majority's ruling, pointing out that respondents actually frustrated the congressional policy, that no public benefit was conferred, and that awarding attorneys' fees when plaintiffs do not prevail is an extraordinary break from precedent:

> [N]o longer is it necessary for such plaintiffs to prevail on the legal theory of their case, nor to confer a discernible undisputed public benefit; it now suffices only to gain the sympathy of the court ultimately passing on legal fees for the substantive merits of plaintiffs' case, and, lo, plaintiffs can fail to prevail legally and dislocate the economy in trying, but can be awarded a consolation prize of attorneys' fees—in this case greater than plaintiffs would otherwise have paid . . . . We can think of no greater encouragement to ill-founded litigation. [App. 35a.]

As Judge MacKinnon added, certainly "with respect to NEPA [respondents' attorneys] drew a complete blank" and "[u]nder such circumstances, it is unreasonable by any fair standard to compensate them for that phase of the case." (App. 27a.)

b. The majority held that an award of attorneys' fees need not be limited to the amounts actually paid to the attorneys by their clients.

The expressed reason for this conclusion was that "it may well be that counsel serve organizations like [respondents] for compensation below that obtainable in the market . . . ." (App. 20a.)

Any award of attorneys' fees in excess of the amount required to make the respondent organizations whole is totally unjustified. As the dissenting judges pointed out, all counsel for respondents were salaried employees of the complaining organizations, and it would have been simple to calculate an award based on their salaries while working on this case. No greater financial encouragement is necessary or would serve any useful purpose.[14] Payment of a bonus to respondents' counsel on the theory that they have "vindicated" a public policy in this case merely subsidizes other litigation which may or may not vindicate such a policy.

c. The majority held that attorneys' fees based on the "private attorney general" rationale could be assessed against a private party which had no control over the actions complained of, when recovery against the government was barred by statute.

The stated purpose of the "private attorney general" exception is to vindicate some public right. This lawsuit was brought to prevent the Secretary of the Interior from taking actions which respondents asserted he had no authority to take. Alyeska was not named a defendant and had no control over the actions complained of. Yet the result of this decision is that the only party which pays respondents' attorneys' fees is Alyeska. The explanation of the majority is that

[14] Indeed, as the dissenting judges observed, *no* financial encouragement was necessary to the bringing of this lawsuit. "[T]he prosecution of litigation of this sort was one of the objects and purposes for which the plaintiff organizations were chartered and existed. We think it unrealistic to say that no suit would have been brought if the plaintiffs had not been able to count on the payment by others of the salaries of their staff attorneys. The plaintiffs were equipped and prepared to act, and no added financial encouragement was necessary." (App. 34a.)

since Alyeska "unquestionably was a major and real party at interest in this case, actively participating in the litigation along with the Government, we think it fair that it should bear part of the attorneys' fees."[15] (App. 18a.)

Judge MacKinnon, in dissent, pointed out that the effect of the majority ruling was to hold Alyeska "answerable for what the majority apparently perceives to be the sins of the Government." Yet "the State of Alaska, also a party defendant and otherwise indistinguishable from Alyeska, escapes liability . . ." (App. 31a.) According to Judge MacKinnon: the real premise of the majority opinion is that "oil companies are prosperous, [respondents] are poor, and therefore oil companies should finance both sides of this litigation." (App. 31a.)

The effect of the court's decision is to discourage intervention by third parties, such as Alyeska, in suits against the government by subjecting intervenors to the risk of being burdened with a substantial attorneys' fees award. To impose this price upon intervention contravenes the policy embodied in the Federal Rules of Civil Procedure adopted by this Court.

Each of these factors—attorneys' fees awarded even with respect to issues on which respondents were not successful, fees authorized in excess of the amounts paid the attorneys, and assessment of fees against a private party which had no control over the actions

[15] This description is of course equally applicable to the State of Alaska, which was both a "major" and a "real party at interest." However, only Alyeska has to pay respondents' fees. Query whether attorneys' fees would have been awarded if Alaska had intervened but not Alyeska.

complained of—is a significant flaw in the court's decision. When these factors are added to the other issues outlined above, it is clear that the decision goes far beyond any previous case and that its impact (in terms of stimulating additional "public interest" litigation, impeding government decision-making and discouraging participation in litigation by interested private parties) will be great.

3. The Court Below Violated the Fifth Amendment's Prohibition Against the Uncompensated Taking of Private Property for Public Use by Taxing Petitioner for Attorneys' Fees of Respondents in Order To Achieve an Alleged Public Purpose.

The Fifth Amendment to the Constitution provides that "private property [shall not] be taken for public use, without just compensation." As this Court explained in *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960), this provision was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

This is a precise description of the majority decision here. The majority found that respondents acted in the "public interest" by prosecuting the lawsuit and hence that an award of attorneys' fees would further the "public interest." But since use of public funds for that purpose (*i.e.*, collection from the Federal Government) was prohibited by statute, the court decided to take the funds from a private party (*i.e.*, Alyeska). To paraphrase *Armstrong*, the result was that Alyeska alone was forced "to bear [alleged] public burdens which, in all fairness and justice, should be borne by the public as a whole." This is exactly what the last

proviso of the Fifth Amendment was intended to prevent.

If the basis for the award by the court below had been wrongdoing on Alyeska's part, a different situation would be presented. But no such wrongdoing has been found. Indeed, the court of appeals emphasized that the legal position of the government and petitioner "was manifestly reasonable and assumed in good faith, particularly in view of the long administrative practice supporting it." (App. 3a.) In the absence of culpability, the uncompensated taking of property from a private party for a public purpose violates the Fifth Amendment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1974

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 72-1796, 72-1797 & 72-1798

THE WILDERNESS SOCIETY,
ENVIRONMENTAL DEFENSE FUND, INC.,
FRIENDS OF THE EARTH

and

DAVID ANDERSON,
CANADIAN WILD LIFE FEDERATION

and

THE CORDOVA DISTRICT FISHERIES UNION, APPELLANTS

v.

ROGERS C. B. MORTON, Secretary of the Interior
EARL L. BUTZ, Secretary of Agriculture

and

ALYESKA PIPELINE SERVICE COMPANY

and

STATE OF ALASKA

On Bills of Costs and Supporting Memoranda

Decided April 4, 1974

Dennis M. Flannery argued in support of the bill of costs for appellants The Wilderness Society *et al.* *John F. Dienelt* was also on the memorandum in support of the bill of costs.

Herbert Pittle, Attorney, Department of Justice, argued in opposition to the bills of costs for federal appellees. *Edmund B. Clark*, Attorney, Department of Justice, was on the memorandum in opposition to the bills of costs for federal appellees.

Robert E. Jordan, III argued in opposition to the bills of costs for appellee Alyeska Pipeline Service Company. *Paul F. Mickey* was also on the memorandum in opposition to the bills of costs.

Theodore L. Garrett argued in opposition to the bills of costs for appellee State of Alaska. *William H. Allen* and *Richard D. Copaken* were on the memorandum in opposition to the bills of costs.

Thomas F. Hogan was on the memorandum in support of the bill of costs for appellant The Cordova District Fisheries Union.

Before BAZELON, *Chief Judge*, and WRIGHT, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*, sitting *en banc*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

Dissenting opinion filed by *Circuit Judge* MACKINNON.

Dissenting opinion, in which *Circuit Judges* MACKINNON and ROBB join, filed by *Circuit Judge* WILKEY.

WRIGHT, *Circuit Judge*: Appellants Wilderness Society, Environmental Defense Fund, Inc. and Friends of the Earth request an award of expenses and attorneys' fees related to the litigation they successfully prosecuted to bar construction of the trans-Alaska pipeline. *See Wilderness Society* v. *Morton*, —— U.S.App.D.C. ——, 479 F.2d 842, *cert. denied*, 411 U.S. 917 (1973). A bill of costs has also been filed by The Cordova District

Fisheries Union, appellant in No. 72-1798. While the primary issue now before us concerns the propriety of assessing attorneys' fees against appellee Alyeska Pipeline Service Company, Alyeska has also raised objections to certain expenses in the bill of costs. We agree with the Government, however, that all expenses requested by Wilderness Society *et al.* are proper, *see* 28 U.S.C. § 1920 (1970); *Ex parte Peterson*, 253 U.S. 300, 318 (1920) (Brandeis, J.), and should be divided equally among Alyeska, the State of Alaska, and the United States. As it was not a prevailing party on any issue in its separate suit, Cordova is not entitled to costs. *See* 28 U.S.C. §2412 (1970). *Cf.* Rule 54(d), FED. R. CIV. P. With respect to the main issue posed, we hold that an award of attorneys' fees is appropriate and remand the case to the District Court to determine the fees.

I

There have always existed equitable exceptions to the traditional American rule barring recovery of attorneys' fees by a successful litigant. In cases in which a party has acted in bad faith, assessment of fees properly serves to punish that party's obdurate behavior. *See Hall* v. *Cole*, 412 U.S. 1, 5 (1973). Another exception includes cases in which the plaintiff's suit confers a benefit on the members of an ascertainable class and in which an award of fees will serve to spread the costs of litigation among its beneficiaries. *See Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

Neither of these historic exceptions is applicable here. Appellees' legal position as to the meaning of the Mineral Leasing Act and relevant administrative regulations, though ultimately rejected by the court, was manifestly reasonable and assumed in good faith, particularly in view of the long administrative practice supporting it. *See Wilderness Society* v. *Morton*, *supra*, —— U.S.App.D.C. at ——-——, 479 F.2d at 864-870. And although the

"common benefit" exception has been given expanded scope in recent cases, *compare Hall* v. *Cole*, *supra*, *with Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), we would have to stretch it totally outside its basic rationale to apply it here. As is discussed more fully below, this litigation may well have provided substantial benefits to particular individuals and, indeed, to every citizen's interest in the proper functioning of our system of government. But imposing attorneys' fees on Alyeska will not operate to spread the costs of litigation proportionately among these beneficiaries, the key requirement of the "common benefit" theory. *See Bangor & Aroostook R. Co.* v. *Brhd of Loc. Firemen & Enginemen*, 143 U.S.App.D.C. 90, 101, 442 F.2d 812, 823 (1971).

The Supreme Court has recently indicated, however, that the equitable power of federal courts to award attorneys' fees when the interests of justice so require is not a narrow power confined to rigid sets of cases. Rather, it "'is part of the original authority of the chancellor to do equity in a particular situation,'" *Hall* v. *Cole*, *supra*, 412 U.S. at 5, *quoting Sprague* v. *Ticonic National Bank*, *supra*, 307 U.S. at 166, and should be used whenever "'overriding considerations indicate the need for such a recovery.'" *Id.*, *quoting Mills* v. *Electric Auto-Lite Co.*, *supra*, 396 U.S. at 391-392.

Recognizing their broad equitable power, some courts have concluded that the interests of justice require fee shifting in a third class of cases where the plaintiff acted as a "'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). *See, e.g., Natural Resources Defense Council* v. *EPA*, 1 Cir., 484 F.2d 1331 (1973); *Cooper* v. *Allen*, 5 Cir., 467 F.2d 836 (1972); *Donahue* v. *Staunton*, 7 Cir., 471 F.2d 475 (1972), *cert. denied*, 410 U.S. 955 (1973); *Cole* v. *Hall*, 2 Cir., 462 F.2d 777 (1972), *affirmed on alternate rationale*, 412 U.S. 1 (1973); *Knight*

v. *Auciello*, 1 Cir., 453 F.2d 852 (1972); *Lee* v. *Southern Home Sites Corp.*, 5 Cir., 444 F.2d 143 (1971); *United Steelworkers of America* v. *Butler Manufacturing Co.*, 8 Cir., 439 F.2d 1110, 1113 (1971); *Sierra Club* v. *Lynn*, W.D. Tex., 364 F.Supp. 834, 5 E.R.C. 1745 (1973); *Stanford Daily* v. *Zurcher*, N.D. Cal., 366 F.Supp. 18, 23-24 (1973); *Harper* v. *Mayor and City Council of Baltimore*, D. Md., 359 F.Supp. 1187, 1218 (1973); *Calvetics Corp.* v. *Volkswagen of America, Inc.*, C.D. Cal., 353 F.Supp. 1219 (1973); *La Raza Unida* v. *Volpe*, N.D. Cal., 57 F.R.D. 94 (1972); *Wyatt* v. *Stickney*, M.D. Ala., 344 F.Supp. 387 (1972); *NAACP* v. *Allen*, M.D. Ala., 340 F. Supp. 703 (1972); *Sims* v. *Amos*, M.D. Ala., 340 F.Supp. 691 (1972); *Bradley* v. *School Board of City of Richmond*, E.D. Va., 53 F.R.D. 28 (1971), *reversed*, 4 Cir., 472 F.2d 318 (1972), *cert. granted*, 412 U.S. 937 (1973). *See also* Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORN. L. REV. 1222, 1237-1246 (1973).

While this court has not previously had occasion to focus directly on the "private attorney general" rule in attorneys' fees, it stressed the salient consideration in *Freeman* v. *Ryan*, 133 U.S.App.D.C. 1, 3, 408 F.2d 1204, 1206 (1968), when it accompanied an award of attorneys' fees with the comment:

> "Our objective is to proceed in accordance with equitable principles so as to reward the attorneys whose service in stopping an unauthorized payment has been of benefit to the class of private persons involved, and to the public interest in observance by administrative and executive officials of statutory limitations on their authority."

It is a paramount principle of equity that the court will go much farther both to grant and to withhold relief in furtherance of the public interest than when only private interests are involved. *See Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515, 552 (1937),

where the Court added that the legislature's declaration of public interest and policy is "persuasive in inducing courts to give relief."

We find persuasive the arguments advanced by these courts in adopting a private attorney general exception to the traditional American rule.

> "The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication * * *. If a defendant may feel that the cost of litigation, and, particularly, that the financial circumstances of an injured party may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing. In such instances public policy may suggest an award of costs that will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right. * * *"

Knight v. *Ancello*, *supra*, 453 F.2d at 853. In much litigation, whether or not formally designated as a class action, a party sues not only to vindicate his own interests, which often are minor, but to enjoin injuries to a broad class—injuries which may be quite extensive when viewed collectively. *See, e.g., Sierra Club* v. *Morton*, 405 U.S. 727, 736-738 & 739 n.15 (1972); *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973). In such cases, "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman* v. *Piggie Park Enterprises, Inc.*, *supra*, 390 U.S. at 402. When violation of a congressional enactment has caused little injury to any one individual, but great harm to important public interests when viewed from the perspective of the broad class intended to be protected by that statute, not to award counsel fees can seriously frustrate the purposes

of Congress. *See Hall* v. *Cole*, *supra*, 412 U.S. at 13-14. Where the law relies on private suits to effectuate congressional policy in favor of broad public interests, attorney's fees are often necessary to ensure that private litigants will initiate such suits. *See Lee* v. *Southern Home Sites Corp.*, *supra*, 444 F.2d at 145. Substantial benefits to the general public should not depend upon the financial status of the individual volunteering to serve as plaintiff or upon the charity of public-minded lawyers. *See Donahue* v. *Staunton*, *supra*, 471 F.2d at 483; *La Raza Unida* v. *Volpe*, *supra*, 57 F.R.D. at 101 & n.10.

Despite the growing trend to recognize these considerations, at least one court has been reluctant to award attorneys' fees under a private attorney general theory, reflecting concern that the exception would swallow up the general rule and result in awarding fees to successful parties in all statutory causes of action. *See Bradley* v. *School Board of City of Richmond*, 4 Cir., 472 F.2d 318, 329-331 (1972), *cert. granted*, 412 U.S. 937 (1973). *Cf.* Note, *The Allocation of Attorney's Fees After* Mills v. Electric Auto-Lite Co., 38 U. CHI. L. REV. 316, 328-336 (1971). Such fears are not lightly to be disregarded, for the American rule barring attorneys' fees to successful litigants except in extraordinary circumstances is based on important policies of its own. But if the matter is examined closely, it becomes evident that the private attorney general exception, at least as applied to the factual circumstances of the present case, is not inconsistent with the policies behind the traditional American rule. To the contrary, an award of fees in the present case may be justified by reference to the very same policies.

II

The chief rationale behind the American rule is the notion that parties might be unjustly discouraged from instituting or defending actions to vindicate their rights

if the penalty for losing in court included the fees of their opponent's counsel.[1] *See Fleischmann Distilling*

[1] Another rationale for the American rule is that "the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967). *See also Oelrichs* v. *Spain*, 82 U.S. (15 Wall.) 211, 231 (1872):

> "* * * There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary."

We think, however, that actual experience is a more trustworthy guide than fears expressed over 100 years ago as to what might come to pass if fees were recoverable. Courts have shown themselves quite able to develop reasonable and workable standards for setting attorneys' fees. *See* text at pp. 19-20 *infra*. Litigation over the amount of fees can hardly be said to be burdensome. Indeed, parties are often able to agree on a reasonable fee. *See, e.g., Sims* v. *Amos*, M.D. Ala., 340 F.Supp. 691, 693 n.3 (1972). Nor has it proved particularly delicate for courts to scale down unreasonable fee requests. *See, e.g., Bates* v. *Hinds*, N.D. Tex., 334 F. Supp. 528, 533 (1971). The apparent ease with which the courts have handled the numerous cases in which fees have been granted, either under statutes expressly authorizing recovery of fees such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1970), or under traditional equitable exceptions, undercuts the dire predictions that determination of appropriate fees will unduly burden the courts. *See, e.g., Robinson* v. *Lorillard Corp.*, 4 Cir., 444 F.2d 791 (1971); *Culpepper* v. *Reynolds Metals Co.*, 5 Cir., 442 F.2d 1078

Corp. v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 639-642 (1931). The possibility of unjust deterrence of litigation is most often stated from the plaintiff's point of view. An individual with a relatively small damage claim, for example, could easily be discouraged from pressing that claim in court, no matter how meritorious he in good faith believed it to be, if losing the lawsuit meant paying the defendant's attorney's fees which might approach or even exceed the value of his claim. *Cf. Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 235 (1964); *id.* at 236-239 (Mr. Justice Goldberg, concurring). *But see* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966). Of course, the argument has equal merit from the defendant's point of view. A defendant faced with a relatively small claim might well be induced to capitulate to the plaintiff's demands, even though he legitimately felt he had a good defense, if losing the case in court would mean paying the plaintiff's attorney's fees. *See* McCormick, *supra*, 15 MINN. L. REV. at 641. Simply stated, then, imposition of attorneys' fees on the losing party is thought to raise the stakes of litigation and thereby to discourage individuals from submitting their rights to judicial determination.

Whatever force this argument concededly has in the great run of civil litigation, we think it plainly inapposite to the circumstances of the present case. As Alyeska has so often brought to our attention, the value of its investment at stake in this litigation was over a billion dollars. Each week's delay in constructing the pipeline imposed an additional $3.5 million in costs. Any award

(1971); *Lea* v. *Cone Mills Corp.*, 4 Cir., 438 F.2d 86 (1971); *Parham* v. *Southwestern Bell Telephone Co.*, 8 Cir., 433 F.2d 421 (1970).

of fees in this case, though conceivably large in an absolute sense, will be paltry in comparison with the interest Alyeska had in defending this appeal. Where the interest at stake is many times greater than the expected cost of one's opponent's attorney's fees, any possibility of deterrence is surely remote if not nonexistent.[3] *Cf.* Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1222-1223 & 1230 (1967).

Looking at this case from appellants' point of view, the unavailability of attorneys' fees might significantly deter them from having brought this meritorious litigation. In prosecuting this case, appellants undertook litigation of monumental proportions. According to their bill of costs, the matters appealed consumed over 4,500 hours of lawyers' time, all in addition to the efforts before the District Court in 1970 when this action was commenced and preliminary injunctive relief obtained. *See Wilderness Society* v. *Hickel*, D. D.C., 325 F.Supp. 422 (1970). This burden was assumed not in the hope of obtaining a monetary award, nor to protect an interest peculiar to appel-

[3] Had appellees been the prevailing parties and sought attorneys' fees from appellants, the possibility of deterrence would be significant and the rationale of the American rule would therefore bar recovery of fees. In this sense there is an admitted lack of reciprocity in granting attorneys' fees under a private attorney general theory. The same lack of reciprocity, however, appears to be present in so-called "common benefit" cases. In *Hall* v. *Cole*, 412 U.S. 1 (1973), for example, the successful plaintiff in a suit brought under § 102 of the Labor-Management Reporting & Disclosure Act of 1959 was awarded fees from the defendant union on the ground the suit benefitted all union members and reimbursement of attorneys' fees out of the union treasury would shift the costs of litigation to these beneficiaries. 412 U.S. at 7-8. Had the defendant union prevailed on the merits, however, it is doubtful that the same theory would have required awarding fees to defendant because of the risk of deterring plaintiffs from bringing suit.

lants and their members, but rather to vindicate important statutory rights of all citizens whose interests might be affected by construction of the pipeline.

Whether we consider the Mineral Leasing Act and administrative regulation issues upon which the court rested its opinion declaring the pipeline unlawful, or the National Environmental Policy Act (NEPA) issues which the court left undecided, appellants succeeded in their role as private attorneys general protecting vital statutory interests.

It is argued that the width limitation in Section 28 of the Mineral Leasing Act of 1920 does not amount to a congressional policy of preeminent importance. But the dispute in this case was more than a debate over interpretation of that Act. Appellees' primary argument was that, whatever the width restrictions in the Act originally meant, a settled administrative practice to evade those restrictions took precedence. In the final analysis, this case involved the duty of the Executive Branch to observe the restrictions imposed by the Legislative, *see Freeman* v. *Ryan*, 133 U.S.App.D.C. 1, 3, 408 F.2d 1204, 1206 (1968), and the primary responsibility of the Congress under the Constitution to regulate the use of public lands. *Wilderness Society* v. *Morton*, *supra*, —— U.S.App.D.C. at ——-——, 479 F.2d at 891-893.

The proper functioning of our system of government under the Constitution is, of course, important to every American, and in this sense appellants' suit had great therapeutic value. *Cf. Mills* v. *Electric Auto-Lite Co.*, *supra*, 396 U.S. at 396. But requiring the Congress to revise the Mineral Leasing Act rather than permitting continued evasion of its clear, though anachronistic, restrictions has had other more concrete and equally important benefits. As a result of this suit, Congress has amended the Mineral Leasing Act to remove the restric-

tions of the 1920 statute and permit construction of the trans-Alaska pipeline. Public Law 93-153, 93rd Cong., 1st Sess. (November 16, 1973). The statute imposes several important new requirements designed to protect the public interest. Rather than continue the prior practice of permitting free use of Government land, the new statute requires the issuing agency to receive the "fair market value" of the right-of-way and empowers the agency to assess against the right-of-way recipient all reasonable administrative costs of processing an application and monitoring the right of way. Pub. L. 93-153, § 101 (amending Mineral Leasing Act of 1920, § 28(*l*)). The statute contains special provisions making the operator of the pipeline strictly liable for damages resulting from use of the right-of-way, *id.*, § 204. The same section of the new statute requires the operator to maintain a $100,000,000 liability fund to satisfy the claims, *id.*, § 204(c)(3). Forcing Alyeska to go to Congress to amend the 1920 Act certainly was not a sterile exercise in legal technicalities devoid of public significance.

The equities in favor of awarding fees for appellants' efforts on NEPA issues are just as compelling.[3] Elaborate specific procedures are provided under the 1973 amendments to ensure protection of environmental interests. *Id.*, § 101 (amending Mineral Leasing Act of 1920, § 28(h)(1) & (2)). One need not have the hindsight of history to know that the commitment to improving and protecting our natural environment is one of the most vital of current national policies. NEPA is only one part of a vast legislative effort toward that end.

[3] The environmental benefit from this litigation is generously recognized by the Honorable Russell E. Train, then chairman of the President's Council on Environmental Quality and now Administrator of the Environmental Protection Agency, before the Joint Judicial Conference of the Eighth and Tenth Circuits on June 29, 1973:

> "The Alaska Pipeline may not have been a tidy example of the judicial process, but it has been an excellent example where NEPA and the courts have forced the reconciliation of environmental concerns with sound engineering practices on a major energy project. The President has now called for construction of the pipeline at the earliest possible date, and the Administration has introduced legislation which would remove the present right-of-way restrictions and is urging swift action on the bill.
>
> [continued]

> "To some any delay in the completion of the pipeline is unreasonable. In reality, though, much of the delay has been beneficial. The problems of constructing a hot oil pipeline across permafrost are very real. The problems of constructing a pipeline across one of the most seismically active and remote areas of the world are likewise very real. These and other significant problems were simply not adequately faced in the initial proposal presented to the Department of the Interior in 1969.
>
> "If the pipeline had been constructed using the original design specifications, it would very likely have resulted in not only very serious environmental damage but also serious operational problems. Indeed, the physical integrity of the pipeline itself was very much at stake.
>
> "Thus, the case of the Alaska pipeline has not been simply one of aesthetics, or of concern over wildlife and wilderness disturbance, or worries over water pollution, important as all of these are. It was clearly an example where sound environmental analysis was essential to sound engineering and siting.
>
> "In all honesty, the process has been one of learning for both industry and government. I believe that industry seriously underestimated the real technical difficulties of the task and failed to appreciate fully—particularly at the outset—the new conditions for decision-making in matters that substantially affect the environment. On its part, government was ill-equipped both institutionally and informationally for dealing with the complex problems of the pipeline. Few would now contend that the Interior Department's first response to NEPA on the pipeline right-of-way application was really adequate."

but it is among the most important because of its broad scope. *See generally Scientists' Institute for Public Information* v. *AEC*, —— U.S.App.D.C. ——, ——-——, 481 F.2d 1079, 1086-1089 (1973). And effective pursuit of congressional policy under NEPA, as with much legislation in the environmental area, depends on the diligence of private attorneys general and their willingness to bring suit to further broad public interests.[4]

Nor do we think it of controlling importance that this court did not actually decide the NEPA issues and that Congress has subsequently decided in the pipeline legislation that the impact statement prepared by the Department of the Interior shall be deemed sufficient under NEPA. *See* Pub. L. 93-153, *supra*, § 203(d). The advancement of important legislative policy justifying an award of attorneys' fees can be accomplished even where the plaintiff does not obtain the ultimate relief sought by the filing and prosecution of his suit. *See, e.g., Mills* v. *Electric Auto-Lite Co., supra*. Where litigation serves as a catalyst to effect change and thereby achieves a valuable public service, an award of fees may be appropriate even though the suit never proceeds to a successful conclusion on the merits. *See Parham* v. *Southwestern Bell Telephone Co.*, 8 Cir., 433 F.2d 421 (1970).

[4] *See, e.g., Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971) (Department of Transportation Act and Federal-Aid Highway Act); *Natural Resources Defense Council, Inc.* v. *EPA*, 1 Cir., 484 F.2d 1331 (1973) (Clean Air Amendments of 1970); *Scientists' Institute for Public Information* v. *AEC*, —— U.S.App.D.C. ——, 481 F.2d 1079 (1973) (NEPA); *National Resources Defense Council, Inc.* v. *Morton*, 148 U.S.App.D.C. 5, 458 F.2d 827 (1972) (NEPA); *Calvert Cliffs' Coordinating Committee* v. *USAEC*, 146 U.S.App.D.C. 33, 449 F.2d 1109 (1971) (NEPA); *Environmental Defense Fund* v. *Ruckelshaus*, 142 U.S.App.D.C. 74, 439 F.2d 584 (1971) (Federal Insecticide, Fungicide, & Rodenticide Act); *Sierra Club* v. *Lynn*, W.D. Tex., 364 F.Supp. 834, 5 E.R.C. 1745 (1973) (NEPA).

Cf. Gilson v. *Chock Full O'Nuts Corp.*, 2 Cir., 331 F.2d 107 (1964) (*en banc*).

Here appellants' lawsuit and appeal served as a catalyst to ensure that the Department of the Interior drafted an impact statement and that the statement was thorough and complete. It must be recalled that when appellants commenced this suit in 1970 the Interior Department, though ready to issue the necessary rights-of-way, had not yet drafted an environmental impact statement for the pipeline. The failure to comply with NEPA was an alternative ground for the District Court's preliminary injunction. *See Wilderness Society* v. *Hickel, supra*, *Cf. McEnteggart* v. *Cataldo*, 1 Cir., 451 F.2d 1109 (1971), *cert. denied*, 408 U.S. 943 (1972). Requiring the Department to draft an impact statement as mandated by law not only benefitted the public's statutory right to have information about the environmental consequences of the pipeline. It also led to the refinement of environmentally protective stipulations placed as conditions on the rights-of-way.

Although Congress has now given the go-ahead to the pipeline on the basis of the impact statement prepared by the Department, this appeal helped focus attention in Congress on the major issue raised—the relative merits

[5] *See* UNITED STATES DEPARTMENT OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT: PROPOSED TRANS-ALASKA PIPELINE, Vol. I, App. (1972). Under the 1973 amendments to the Mineral Leasing Act of 1920, the right-of-way for the trans-Alaska pipeline is expressly made subject to the terms and conditions of these stipulations. *See* Pub. L. 93-153, 93d Cong., 1st Sess. (Nov. 16, 1973), § 203(c). It is also interesting to note that many of those in Congress supporting immediate construction of the trans-Alaska pipeline did so because "the environmentalists—through long delays they already have forced—achieved the inclusion of strong safeguards in plans for the Alaskan line." 119 CONG. REC. S13571 (daily ed., July 16, 1973) (Senator Fannin).

of a trans-Canadian *versus* a trans-Alaskan route.* *See, e.g.*, 119 CONG. REC. S12795-S12803 (daily ed., July 9, 1973). *See also* Title III of Pub. L. 93-153, *supra*. We take the action of Congress approving the impact statement, not as a total rejection of the arguments made on appeal, but rather as a recognition that appellants had raised a very substantial question which the courts were likely to require considerable time to resolve and that, time being of the essence in providing for delivery of North Slope oil, a congressional resolution was required.'

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* Senator Peter Dominick of Colorado and his former legislative assistant, David Brody, refer to our original decision in this case as a "remand" to the Congress to consider, not only the amendment of the Mineral Leasing Act of 1920, but the environmental issue as well. The action of Congress in amending the Act and resolving the environmental issue resulted in the voluntary dismissal of this entire litigation on January 16, 1974.

> "Whatever the shortcomings in having the courts decide major issues on rather narrow bases, such disadvantages are outweighed by the result of transferring the controversy to the proper forum—the legislature. The goal of increasing public participation in environmental decision-making is furthered by the remand disposition. Normally, this disclosure function is accomplished in the administrative process under NEPA; information disclosed in impact statements may provoke public entry into bureaucratic decision-making.[1] The process of remand further provokes public involvement, and encourages the Congress to employ a national perspective and thus concern itself with the broad issues involved. * * *"

Dominick & Brody, *The Alaska Pipeline:* Wilderness Society v. Morton *and the Trans-Alaska Pipeline Authorization Act*, 23 AMER. U. L. REV. 337, 352-353 (1973). In note 61 the authors cite *Natural Resources Defense Council, Inc.* v. *Morton*, 148 U.S.App.D.C. 5, 11, 458 F.2d 827, 833 (1972), where we developed the need for a full impact statement for the purpose of informing the legislature and the public—not merely higher-ups in the chain of executive command.

' Senator Gravel, the author of the amendment which provided that actions already taken by the Department of the

We also deem it significant that the Mineral Leasing Act issues on which appellants clearly prevailed were somewhat interrelated with the NEPA issues. It required a precise analysis of the exact impact of the pipeline as explicated in the impact statement in order to pass on the Government's claim that the special land use permit involved only a revocable license rather than a permanent right-of-way. *See Wilderness Society* v. *Morton*, *supra*, —— U.S.App.D.C. at ——-——, 479 F.2d at 873-875. In addition, we note that after it became clear that the Interior Department would persist in issuing the right-of-way despite the District Court's initial decision that the right-of-way violated the Mineral Leasing Act, appellants sought summary judgment on the Mineral Leasing Act issue alone so that this matter could be resolved by the courts without wading into the more factually complex NEPA issues. Summary judgment was opposed by appellees, and appellants were thus forced to brief and argue an issue which, because of their very success on the Mineral Leasing Act issue, never became ripe for adjudication. *Compare Switzer Bros., Inc.* v. *Chicago Cardboard Co.*, 7 Cir., 252 F.2d 407 (1958). Taking into account all these factors, we think the equities favor awarding fees for appellants' efforts on the NEPA issues even though the court rendered no judgment on these matters.

In sum, the equities of this particular case support an award of attorneys' fees to the successful plaintiffs-appellants. Acting as private attorneys general, not only have they ensured the proper functioning of our system of government, but they have advanced and protected in

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Interior shall be deemed sufficient compliance with NEPA, argued that were his amendment defeated "we would see ourselves languishing in court for a year to 2 years * * *." 119 CONG. REC. S13571 (daily ed., July 16, 1973). *See also id.* at S13574 (Senator Fannin); *id.* at S13684 (July 17, 1973) (Senator Fannin).

a very concrete manner substantial public interests. An award of fees would not have unjustly discouraged appellee Alyeska from defending its case in court. And denying fees might well have deterred appellants from undertaking the heavy burden of this litigation.

III

Even if fees are to be awarded under a private attorney general theory, a question is posed as to whether Alyeska should bear them. Technically, it is the Interior Department, on Alyeska's application, which violated the Mineral Leasing Act by granting rights-of-way in excess of the Act's width restrictions, and it is the Interior Department's failure to comply with NEPA which was challenged on appeal. Under 28 U.S.C. § 2412, however, no attorneys' fees can be imposed against the United States. Alyeska argues that it is inappropriate to circumvent the statute by taxing it for a dereliction not its own.

Fee shifting under the private attorney general theory, however, is not intended to punish law violators, but rather to ensure that those who have acted to protect the public interest will not be forced to shoulder the entire cost of litigation. *Cf. Hall* v. *Cole*, *supra*, 412 U.S. at 14. After successfully persuading the Interior Department to grant the rights-of-way, Alyeska intervened in this litigation to protect its massive interests. Since Alyeska unquestionably was a major and real party at interest in this case, actively participating in the litigation along with the Government, we think it fair that it should bear part of the attorneys' fees.* *Cf. Silva* v.

* In the circumstances of this case it would be inappropriate to tax fees against appellee State of Alaska. The State voluntarily participated in this suit, in effect to present to the court a different version of the public interest implications of the trans-Alaska pipeline. Taxing attorneys' fees against

Romney, 1 Cir., 473 F.2d 287 (1973). In recognition of the Government's role in the case, on the other hand, Alyeska should have to bear only half of the total fees. The other half is properly allocated to the Government and, because of the statutory bar, must be assumed by appellants. In this manner the equitable principle that appellees bear their fair share of this litigation's full costs and the congressional policy that the United States not be taxable for fees can be accommodated.

Because assessment of fees, even for services on appeal, involves factual questions, the amount of an award should as a general rule be fixed in the first instance by the District Court, after hearing evidence if necessary as to the extent and nature of the services rendered. *See Perkins* v. *Standard Oil Co. of California*, 399 U.S. 222 (1970); *United Pacific Insurance Co.* v. *Idaho First National Bank*, 9 Cir., 378 F.2d 62, 69 (1967). We observe that procedure here, with only the following limited guidance as to the standard to be applied by the District Court in determining the fee. The fee should represent the reasonable value of the services rendered, taking into account all the surrounding circumstances, including, but not limited to, the time and labor required on the case, the benefit to the public, and the skill demanded by the novelty or complexity of the issues. *See generally Angoff* v. *Goldfine*, 1 Cir., 270 F.2d 185, 188-189 (1959); *Pergament* v. *Kaiser-Frazer Corp.*, 6 Cir., 224 F.2d 80, 83 (1955); *Harris* v. *Chicago Great Western R. Co.*, 7 Cir., 197 F.2d 829, 832-833 (1952). *Cf. Bakery & Confectionery Wkrs International Union* v. *Ratner*, 118 U.S. App.D.C. 269, 273-275, 335 F.2d 691, 695-697 (1964).

Finally, a question is raised as to how the fees should be distributed as among appellants, the attorneys, and

Alaska would in our view undermine rather than further the goal of ensuring adequate spokesmen for public interests.

the organizations for which some of the attorneys are salaried employees. After determining a reasonable fee and dividing it in half, as indicated above, the District Court should ensure that the three appellant organizations are reimbursed for any payments they have already made to counsel. The first purpose of an award of fees is to make the client whole. *See Clark* v. *American Marine Corp.*, E.D. La., 320 F.Supp. 709 (1970), *affirmed*, 5 Cir., 437 F.2d 959 (1971); *United States* v. *State Farm Mutual Automobile Insurance Co.*, D. Ore., 245 F.Supp. 58 (1965).

The fee award need not be limited, however, to the amount actually paid or owed by appellants. It may well be that counsel serve organizations like appellants for compensation below that obtainable in the market because they believe the organizations further a public interest. Litigation of this sort should not have to rely on the charity of counsel any more than it should rely on the charity of parties volunteering to serve as private attorneys general. The attorneys who worked on this case should be reimbursed the reasonable value of their services, despite the absence of any obligation on the part of appellants to pay attorneys' fees. *See Miller* v. *Amusement Enterprises, Inc.*, 5 Cir., 426 F.2d 534 (1970); *Clark* v. *American Marine Corp.*, *supra*, 320 F.Supp. at 711.

It is our view that the award must go to counsel rather than to the organizations which pay their salaries. This is sound, whether such organization is a litigating party or a public interest law firm or defense fund. This procedure avoids all problems of whether the organization might, by receiving an award directly, be involved in the unauthorized practice of law. On the other hand, the equitable foundation of the award of counsel fees persists after the award to require the counsel to reimburse their respective organizations for the kinds of expenses

they incurred which would normally be included in an attorney's fee—compensation paid for the services of attorneys and their adjunct staffs, *e.g.*, legal stenographers, and for the supplies and services required by the attorneys in order that they might render their legal services. This procedure will operate equitably, both to prevent loss to the organization and to avoid double benefit to counsel. But any amount in excess of such reimbursement belongs to counsel themselves. That excess may, in whole or in part, be contributed to the organization involved, or to like causes, or retained by counsel, and we revert to the possibility that the salary they previously received represented less than they could have earned on the market in the absence of their dedication to the public interest.*

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* In his dissent Judge Wilkey quotes from a memorandum and several affidavits submitted to the District Court on July 19, 1971 by plaintiffs (appellants here) and their Washington, D. C. lawyers in opposition to the defendant Secretary's motion for change of venue to Alaska. These documents contain representations that plaintiffs could not afford to pay attorneys' fees, that plaintiffs' Washington lawyers were serving without fee, and that these lawyers were unable to self-finance the conduct of extensive litigation in Alaska. The dissent suggests that plaintiffs were guilty of misrepresentation, by either commission or omission, and that this misrepresentation affected the District Judge's denial of the motion for venue change. On both counts the dissent is mistaken.

(1) There was no misrepresentation. Plaintiffs were not able to pay attorneys' fees; plaintiffs were not paying fees to their Washington lawyers; these lawyers did not have sufficient funds of their own to carry on this complex case in Alaska. At no point did plaintiffs or their lawyers state, hint, or imply that they would abstain from seeking an award of fees. In fact there is no evidence and no reason to believe that plaintiffs had, by July of 1971, given any thought whatever to the possibility of a fee award. Plaintiffs could not

have known then that they would win their case in such a way as to justify an award. In July of 1971 no circuit had yet ruled that such an award was proper on behalf of "private attorney general" litigants in environmental suits successfully prosecuted in the public interest. Our circuit so rules for the first time today—in a 4 to 3 opinion. Does the dissent seriously suggest that plaintiffs had a duty to prophesy their victory, the nature of their victory, and the future development of case law concerning fee awards so that it could have "been represented to the District Court that plaintiffs' counsel would seek and be awarded * * * a fee"? We must point out that neither plaintiffs nor their counsel are soothsayers.

(2) Assuming *arguendo* that, by July 1971, plaintiffs had given thought to requesting a fee award in the event of ultimate victory, a representation to this effect would *not*, as the dissent asserts, have cast the venue issue into "a dramatically different light before the District Judge." Plaintiffs' intentions on this score could have had no bearing on the venue issue. That, we imagine, is why *no party*, including the District Judge, showed the slightest interest in plaintiffs' intentions. The dissent fashions two wonderfully ambiguous sentences to link together the fee award and venue issues:

> Plaintiffs could not have argued that they would be deprived of counsel, either those already chosen or others, by a change in venue to Alaska or any other place. The lively expectation of such fees as may now be awarded would have brought many lawyers to plaintiffs' side, either in Alaska or elsewhere.

We are constrained to remind the dissenters:

(a) Neither the plaintiffs nor anyone else could have notified the Alaska bar in July of 1971 that we would hold as we do today. For plaintiffs to have announced in July of 1971 that they might seek an award of fees in the event of ultimate victory would not have created a "lively expectation of such fees" in Alaska or anywhere else. Plaintiffs had yet to win their suit; the case law concerning fee awards had yet to mature. Plaintiffs' hopes and intentions—whatever they might have been in July 1971—were not legal tender, and would have added not one penny to plaintiffs' financial capacity to prosecute the suit here or in Alaska. The dissenters forget the chronological nature of our legal system, whereby pre-

trial motions typically proceed in ignorance of the ultimate outcome of the litigation. Perhaps, however, the dissenters are trying to make a separate point, *i.e.* that our decision today may increase the willingness of skilled lawyers throughout the nation to undertake public interest litigation on behalf of unmonied clients with just, lawful, and important claims. This proposition we of course accept, and count it a happy result of our decision.

(b) It was *not* the Secretary's position on the motion for change of venue that plaintiffs should switch to Alaska counsel for prosecution of the suit in that state. The Secretary fully conceded that a change of counsel would be "undesirable," given the months of preparation which plaintiffs' Washington lawyers had already committed to the case. Response to Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Change Venue, July 27, 1971, at 8-9. Rather, the Secretary argued that the case could be resolved by plaintiffs and their Washington lawyers with "a few trips to Alaska." *Id.* This was a bizarre view of the suit's complexity, and it would hardly have been rendered realistic or plausible by a representation that plaintiffs might ultimately seek a judicial award of fees.

(c) Plaintiffs' most telling arguments on the venue question did *not* turn on the scarcity of "free" counsel in Alaska. At the crux of plaintiffs' position was a showing that it was in the District of Columbia that plaintiffs' staffs and organizations were headquartered, that all pertinent Government documents were located, that the most important expert witnesses were available, and that the case had already been litigated for 16 months with no inconvenience to the Government. In addition, plaintiffs argued extensively and persuasively that the legal issues at stake were matters not of local but of national, even international, concern. *See generally* Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Change Venue, July 19, 1971, and accompanying affidavits. The District Judge's ruling was phrased in commensurately broad terms, with no mention of availability of counsel. He held that

> the defendant has failed to show that the requested transfer would serve the convenience of parties and witnesses and the interest of justice.

[continued]

An order will enter awarding statutory costs, and the bill of costs is remanded to the District Court for the setting of attorneys' fees.

So ordered.

Order of Aug. 9, 1971. In our judgment it cannot be seriously contended that this eminently sound determination could have been affected by the possibility—at that time so speculative as to seem quixotic—that attorneys' fees might ultimately be awarded in this case.

MACKINNON, *Circuit Judge*, dissenting: The majority opinion orders that Alyeska, a private party, pay one-half of appellants' attorneys' fees. The other half, presumably the obligation of the Government, will not be paid because the Government cannot be assessed for costs in such cases. In awarding attorneys' fees against Alyeska the majority is promoting a continuance of some of the same errors that were contained in their initial opinion and which were in effect overridden by Congress in the enactment of the Alaska Pipeline bill.

The majority say they—

> take the action of Congress approving the impact statement, not as a total rejection of the arguments made on appeal, but rather as a recognition that appellants had raised a very substantial question which the courts were likely to require considerable time to resolve and that, time being of the essence in providing for delivery of North Slope oil, a congressional resolution was required.

Op., *supra*, at 16. The majority in straining for some acceptance of its judicial failure to act on the Environmental Impact Statement also quotes an article by Dominick and Brody. Op., *supra*, n.6. The referenced statement, however, is actually a serious criticism in a gentlemanly manner, of this court's refusal to perform its assigned judicial function. Certainly one cannot persuasively argue that Congress was the proper forum to determine the *judicial validity* of the Environmental Impact Statement.

To my view it is perfectly obvious that Congress' action in approving the Impact Statement by a rarely used legislative finding amounted to "a total rejection of the arguments made on appeal." because Congress would not deprive a court (this court) of its basic jurisdiction unless it felt that the court had misused its power in the past and could not, at least with respect to this case, be

relied on in the future. Certainly the need for expedition was not the principal motive; if that were the case, Congress could simply have required a speedy decision by this court in the statute. Also, the issues dealt with in the Impact Statement were too important in the national scheme not to be properly resolved in a project of this tremendous magnitude. So Congress approved the Impact Statement, where this court had refused to even consider it, by declaring that the Alaska Pipeline should be constructed

> as described in the Final Impact Statement of the Department of the Interior . . . *without further action under the National Environmental Policy Act of 1969* . . . .[1]

Indeed, Congress went further and deprived this court of its normal right to judicially review decisions of the U.S. District Court under the Alaska Pipe Line bill by providing in effect that this court should not have jurisdiction of any claim challenging "the actions of Federal officers concerning the issuance of rights-of-way [etc.] claims alleging the invalidity of . . . section 203(d) . . . and [even] claims alleging the [denial of] . . . rights under the Constitution . . . ."[2] Certainly such drastic, unheard of and almost unprecedented action cannot be explained away on such self-serving grounds as the majority sets forth, *supra*. To my mind, the action by Congress is a plain indication that it considered the prior refusal of this court to perform its constitutional duty as an indication that it could not be expected properly to perform its duty with respect to this matter in the future.

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[1] P.L. 93-153, § 203(d), Act of Nov. 16, 1973 (emphasis added).

[2] *Id.* § 203(d).

Then, to add insult to injury, the majority attempts to compensate attorneys for their work on the NEPA issue, the main objective of which sought to protect the *American* environment by compelling construction of the pipeline through Canada, a foreign country. The majority of this court did not consider the NEPA issue; instead it left it as a factor to be decided in the future, with the delay necessarily attendant to such deferred consideration. Congress, however, considered and found the NEPA Impact Statement to be adequate. So the efforts of appellants' attorneys with respect to NEPA drew a complete blank. Under such circumstances, it is unreasonable by any fair standard to compensate them for that phase of the case.

The majority assert that the Mineral Leasing Act issues "were somewhat interrelated with the NEPA issues." If this were so, it was all the more incumbent upon this court to examine them and render the decision required by the case presented. This argument by the majority is more in the nature of an improper *post hoc* rationalization.

Moreover, the main effect of appellants' NEPA claim would have been to subject a vital part of our energy supplies to the future veto of a foreign government. This would have been a continuation of the gross error made by the decision of this court in *Natural Resources Defense Council v. Morton*, 148 U.S.App.D.C. 5, 458 F.2d 827 (1972), which forced this nation to consider the alternative availability of foreign oil before the Government could allow any development of our own offshore oil resources. At that time (January 13, 1972), my dissent vigorously objected to such decision on the ground that *foreign oil could not be considered to be a "realistic alternative" because the objective of the Outer Continental Shelf Lands Act was to make this nation self-sufficient in oil.* To compel this nation to consider avail-

able foreign oil as a precondition to developing our own petroleum and energy resources was thus a complete negation of the objective of the Act. Significant language of my dissent which pointed to some of the hazards to which the court was thereby subjecting this nation stated:

> In the event that all import quotas were removed and all the oil production of our Outer Continental Shelf could be replaced by foreign oil, it is common knowledge that such course would not be adopted because *the United States would then be wholly dependent upon foreign oil. We would be powerless as a nation to resist exorbitant prices for that oil, and we would be powerless to defend ourselves in a national emergency. It is thus essential to our national survival that we develop our own national production.* It seems plain to me that that is precisely the policy that Congress declared on August 7, 1953 when it passed the act authorizing the Secretary of the Interior, as a matter of national policy, to lease the lands of the Outer Continental Shelf for oil exploration. . . . In passing the Outer Continental Shelf Lands Act in 1953, Congress recognized the *"urgent need"* for developing our offshore oil.
>
> Sec. 8. *Leasing of outer Continental Shelf.*—(a) In order to meet the *urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf*, the Secretary is authorized to grant . . . leases on submerged lands of the outer Continental Shelf . . . .
>
> Outer Continental Shelf Lands Act of 1953, § 8, ch. 345, § 8, 67 Stat. 468, *codified at* 43 U.S.C. § 1337 (1970) (emphasis added).

The national needs behind this congressional declaration of policy were also referred to in the committee reports which accompanied the bill for the Outer Continental Shelf Lands Act. *These stated that the development and operation of such lands through leases for oil and gas operations were vital to our national economy and security*:

> Representatives of the Federal departments, the States, and the offshore operators . . . were unanimously of the opinion, in which this committee agrees, that no law now exists whereby the Federal Government can lease those submerged lands, *the development and operation of which are vital to our national economy and security*. . . .
>
> H.R.Rep. No. 413, 83d Cong., 1st Sess. 2-3, 153, 1953 U.S. Code Cong. & Admin. News, p. 2178 (emphasis added).
>
> Congress has thus officially committed our government officials by statute to a policy of developing our offshore oil resources.

148 U.S.App.D.C. at 19-20, 458 F.2d at 841-42 (emphasis added). Nevertheless, the majority ignored the clear intent of Congress and compelled the Government to consider the alternative of *foreign oil*. They seek now to compensate a group whose principal objective, following this court's approval of the principle in *NRDC* v. *Morton*, *supra*, was to make our vital energy needs further dependent upon another foreign country. By contrast, I believe that the action of Congress in the Alaska Pipe Line Act, and current events in the Near East, effectively reverses the decisions of this court to the extent that they might reasonably be said to require consideration of any foreign alternatives prior to commencing development of our own vital energy resources. While we must suffer for the substantial delay caused by these misguided decisions, I refuse to concur in paying for the efforts of those who sought to further aggravate the injury.

For this reason I would refuse to compensate appellants' attorneys for any work they did on the NEPA issue—the main thrust of which would have made us further dependent upon another foreign nation, albeit our good neighbor, the Queen of the Snows to the north, for

resources vital to our well-being as an independent nation. *When we subsidize lawyers to bring such suits against our national interests we promote our own destruction.* That we should not do.

In addition to recovery on the basis of an issue never decided by this court, appellants' victory here is premised on the narrow statutory interpretation issue on which they actually prevailed on the merits. This is a slender reed on which to rest recovery, however, for the width limitation surely was not the motivating force behind appellants' decision to institute legal action. Nonetheless, the majority seizes it with alacrity and raises it to such cosmic proportions that the issue becomes no less than "[t]he proper functioning of our system of government under the Constitution." Op. at 11. This attenuated approach is demonstrably flawed when applied to Alyeska.

Assuming *arguendo* that forcing the Government to channel its actions within the law could be a valid basis for requiring the Government itself to reimburse appellants' attorney fees, the argument fails as applied to Alyeska.[1] The majority, which discourses freely and at great length on how appellants' have benefited the public weal, apparently feels constrained to limit to three sentences its argument that makes Alyeska, a private party, liable for governmental actions:

> Fee shifting under the private attorney general theory, however, is not intended to punish law violators, but rather to ensure that those who have acted to protect the public interest will not be forced to shoulder the entire cost of litigation. *Cf. Hall v. Cole, supra*, 412 U.S. at 14. After successfully persuading the Interior Department to grant the rights-of-way, Alyeska intervened in this litigation to protect its massive interests. Since Alyeska unquestionably was a major and real party at interest in this case, actively participating in the litigation along with the Government, we think it fair that it should bear part of the attorneys' fees.

Op. at 18 (footnote omitted). Brevity is not always to be desired—especially on the pivotal issue of whether Alyeska should be held answerable for what the majority apparently perceives to be the sins of the Government. Perhaps this brevity, so admirable in other contexts, is attributable to an inability to marshal cogent arguments to support the proposition advanced; more likely, however, such brevity is required to mask sub silentio the major premise of the opinion. That is, oil companies are properous, appellants are poor, and therefore oil companies should finance both sides of this litigation. Thus the essence of the majority's argument is contained in the phrase "we think it fair"; the fact that the State of Alaska, also a party defendant and otherwise indistinguishable from Alyeska, escapes liability is an anomaly that also supports this reading of the majority opinion. Op. at 18 n.8.

Differing perceptions of justice and the public interest are understandable and to be expected, but a judiciary that in large measure depends for its influence on continued public confidence should, at a minimum, set forth in a frank and candid exposition the true bases of its decisions. Only in this manner can they fairly be judged.

For the reasons stated above I dissent from the payment of any fees to appellants.

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[1] The majority correctly points out that 28 U.S.C. § 2412 bars the imposition of attorney fees against the United States.

[1] This discussion is equally applicable to the NEPA issue.

WILKEY, *Circuit Judge*, joined by MACKINNON and ROBB, *Circuit Judges*, dissenting: We respectfully dissent. It is difficult to see that either of these plaintiffs "acted as a 'private attorney general,' *vindicating* a policy that Congress considered of the highest priority." Judging from Congress' most recent action, these plaintiffs have been *frustrating* the policy Congress considers highly desirable and of the utmost urgency.

Nor do we agree that "this litigation may well have provided substantial benefits to particular individuals." Aside from the numerous lawyers involved, we are at a loss to know who those "particular individuals" enjoying "substantial benefits" might be. It is hard to visualize the average American in this winter of 1973-74, turning down his thermostat and with a careful eye on his auto fuel gauge, feeling that warm glow of gratitude to those public-spirited plaintiffs in the Alaska Pipeline case.

While no one questions the sincere motives of these "public interest" plaintiffs it is not enough for a plaintiff to have a sincere feeling of self-righteous correctness in bringing litigation. There is the matter of *good judgment in assaying just where the public interest lies.* Did the plaintiffs exercise good judgment here in bringing suit to block the Alaska Pipeline? In retrospect, we submit they did not.

And in retrospect is precisely the way the award of attorneys' fees is always judged. By delaying the obtaining of oil from the North Slope of Alaska for several years, the plaintiffs conferred *no public benefit* on the United States of America.[1] Nor did they prevail on their

[1] Without overlooking the speech of the Honorable Russell E. Train, relied on by the majority, it may be pertinent to inquire how this was interjected into the Record of this case on appeal. Certainly it does not appear that these rather broad generalities were ever subjected to any cross-examination. Significantly, these remarks were made in the comfort of last June; it is possible that this generous warmth of appreciation may have cooled by this December.

principal legal argument with regard to the National Environmental Policy Act, for the District Court ruled *against* them on this issue and this court declined to rule at all. The plaintiffs did prevail on their subsidiary issue of the width of the right of way required, which Congress has now changed to permit construction of the pipeline along the same route to which plaintiffs objected on environmental grounds, but alas, several years later.

This stands as plaintiffs' net achievement: the amendment of the 1920 Mineral Leasing Act to authorize a wider right of way, quite the opposite of the plaintiffs' objective to limit the right of way to 25 feet on each side. Against this public service must be weighed the public *dis*service in blocking access to the much needed oil at a critical time in our history, and the enormously higher cost we must all pay. As the majority states (p. 9): "Each week's delay in constructing the pipeline imposed an additional $3.5 million in costs." This is $182 million per year. Plaintiffs' litigation has lasted over three and a half years, the delay is at least as long as the litigation, so construction costs have been upped *at least* $637 million—well over half a billion dollars, all of which will be paid for by the American consumer, when the oil finally arrives.

From the plaintiffs' legal failure and, in our opinion, substantial disservice to our country the majority of this court has managed to resurrect something of a victory for the plaintiffs, and in so doing has fashioned a dangerous precedent on attorneys' fees. The majority points out: ". . . the unavailability of attorneys' fees might significantly deter them from having brought this meri-

torious (sic) litigation" (p. 10). "And denying fees might well have deterred appellants from undertaking the heavy burden of this litigation" (p. 18). We are not impressed by the suggestion that the plaintiffs would not have sued, absent the prospect of legal fees to be paid by the defendants or the intervenors. At oral argument it was conceded that all counsel for the plaintiffs were salaried employees of the complaining organizations. This litigation must have been within the scope of the employment of these lawyers; indeed, the prosecution of litigation of this sort was one of the objects and purposes for which the plaintiff organizations were chartered and existed. We think it unrealistic to say that no suit would have been brought if the plaintiffs had not been able to count on the payment by others of the salaries of their staff attorneys. The plaintiffs were equipped and prepared to act, and no added financial encouragement was necessary.

With regard to other attorneys and potential plaintiffs, not so securely situated, the hope of attorneys' fees spawned by this ill-advised decision may be just the stimulus needed to launch them in the direction of the courthouse, unembarrassed by any humility as to their knowledge of where the "public interest" lies. The flood of "public interest" litigation, particularly in the environmental field, is given a new impetus by the majority decision.

No authorities beyond those cited in the court's opinion need be cited to establish that plaintiffs are not entitled to attorneys' fees, because those authorities hold that, on any theory, to be so entitled, plaintiffs must show that they (1) prevailed on some important legal issue, and (2) conferred a public benefit. Without impugning plaintiffs' good intentions or demonstrated legal skills, as of December 1973 these plaintiffs have done neither. The award of legal fees is thus unjustified and unwise.

For mark this: no longer is it necessary for such plaintiffs to prevail on the legal theory of their case, nor to confer a discernible undisputed public benefit; it now suffices only to gain the sympathy of the court ultimately passing on legal fees for the substantive merits of plaintiffs' case, and, lo, plaintiffs can fail to prevail legally and dislocate the economy in trying, but can be awarded a consolation prize of attorneys' fees—in this case greater than plaintiffs would otherwise have paid (Majority Opinion, pp. 20-21). The extraordinary and unprecedented nature of what the majority has done here could not be better described than by the majority itself in footnote 9 (p. 21). We can think of no greater encouragement to ill-founded litigation.

One further fact, making the action of the majority in awarding attorneys' fees even more astounding, must be brought out: counsel for plaintiffs, in pleading and by affidavit, *represented to the District Court that there would be no attorneys' fees charged in this case*. The venue of the case was retained in the District of Columbia only after repeated assurances to the court, by counsel who now demand attorneys' fees, that they were contributing their work without fee as a public service.

In response to the defendant Secretary's "Motion to Change Venue" of this Alaska Pipeline case to Alaska, one of plaintiffs' main points was that plaintiffs' Washington counsel had undertaken the representation for "*no fee*," and that plaintiffs neither could afford to send these Washington lawyers to Alaska nor could plaintiffs obtain counsel in Alaska "who would handle this case *without fee*". Said plaintiffs' Memorandum of 19 July 1971 (emphasis supplied throughout):

> Plaintiffs' lawyers—members of a District of Columbia *pro bono publico* law firm *working for no fee* —have undertaken a massive, on-going legal effort, . . .

. . . .

. . . Lacking the resources to retain the services of a private law firm, Plaintiffs requested assistance from the Center for Law and Social Policy. *The Center agreed to furnish attorneys who would work without fee.*

. . . . .

On March 23, 1970, Plaintiffs, through their *volunteer attorneys*, filed in this Court a Complaint . . . .

. . . . .

. . . And, venue in the District of Columbia is not just a convenience to Plaintiffs, it is, for all practical purposes, a *sine qua non* for continuation of this crucial litigation.

. . . . .

C. *Plaintiffs Inability to Litigate in Alaska*

The Center for Law and Social Policy, *which up to now has furnished Plaintiffs with attorneys for no fee*, could not under foreseeable circumstances afford to send its lawyers to Alaska to handle this case. (See attached affidavit of Charles Halpern). . . .

. . . [I]t does not appear that Plaintiffs will be able to retain substitute counsel. According to Plaintiffs' information, there are no *pro bono publico* lawyers in Anchorage who would handle this case *without fee*; . . .

The probable effect of the transfer, therefore, will be to require Plaintiffs to discontinue the case.

Plaintiffs' Memorandum in opposition to any change of venue was supported by, among others, the affidavit of Charles R. Halpern, who as plaintiffs' counsel had signed the Memorandum from which the above quotations were taken. Said Mr. Halpern's affidavit:

2) The Center for Law and Social Policy is a non-profit, tax-exempt corporation organized under the laws of the District of Columbia. The Center has a staff of full-time attorneys who . . . provide legal representation to groups and individuals who have previously been unrepresented in the federal decision-making process, primarily in the environmental, . . .

Pursuant to that program, Center attorneys undertook representation of the plaintiffs in this case.

. . . . .

8) *Legal representation has been provided to the plaintiffs in this case without fee.* Plaintiffs have paid only litigation expenses, and the Wilderness Society has made a grant of $5,000 to the Center to cover a part of the salary of Mr. Hillyer.

. . . . .

11) Had plaintiffs been forced to file or maintain this case in Alaska, it is clear that Center attorneys could not have participated effectively in the case, and, in my opinion, it is highly unlikely that plaintiffs would have been able to obtain the services of a staff of attorneys qualified to represent them.

Plaintiffs' position was further supported by the affidavit of Stewart M. Brandborg, Executive Director of The Wilderness Society, one of the three plaintiffs, who said:

2) The Wilderness Society is a non-profit corporation, incorporated in the District of Columbia. It has an annual budget of $1,100,000. . . .

. . . . .

6) The Wilderness Society has no unused income to devote to a major legal battle such as this case. *It is dependent on the services of pro bono lawyers such as Charles R. Halpern*, who reviews the services performed to date in this case in his Affidavit filed this date. The extent of The Wilderness Society's financial involvement in the case has been the payment since February 1, 1971, of one-half the modest salary of Saunders Hillyer (one of the several attorneys who have worked on this case) and in the payment of some out-of-pocket expenses such as those involved in duplication of documents and long distance telephone calls. *In the event of a transfer to Alaska, The Wilderness Society would be deprived of the free legal services provided by the Center for Law and Social Policy* and would have to hire private attorneys, if such are available (see Affidavit

of Saunders Hillyer), to handle this case at the going rate in Alaska.

George Alderson of plaintiff Friends of the Earth concurred in his affidavit:

> 6) Friends of the Earth has only been able to conduct the above captioned case because of the *many hours of legal services provided without fee* by the attorneys as set forth in the Affidavit of Charles Halpern. Friends of the Earth has no resources with which to pay attorneys in Alaska . . . .
>
> 7) . . . [T]he undersigned, on behalf of Friends of the Earth, Plaintiff in this action, is of the opinion that *Friends of the Earth will be unable to conduct its case should it be transferred to Alaska* as requested by the Defendant.

Of like import was the affidavit of William A. Butler, Washington counsel for the third plaintiff Environmental Defense Fund:

> 4) EDF has been able to participate in the above-captioned case because of the *legal services provided without fee* by the attorneys at the Center for Law and Social Policy, as set forth in the Affidavit of Charles Halpern of July 1971. . . . [W]ithout the continued support of the co-plaintiffs in this case and without the continued use of *pro bono publico* lawyers, the Environmental Defense Fund would be unable to prosecute this case. [See affidavits of George Alderson of Friends of the Earth; Stewart Brandborg from The Wilderness Society; and Charles Halpern.]

In contrast was the affidavit of Peter LaBate, then (30 July 1971) President of the Alaska Bar Association. After referring to the number and character of counsel available to plaintiffs in Alaska, should the Secretary's motion for change of venue be granted, Mr. LaBate said:

> Included are many lawyers of outstanding competence and experience, graduates of the most prestigious law schools in the United States. Many have distinguished records of *service without compensation* in cases of public importance and are thoroughly versed in federal law relating to land and the environment. . . .
>
> As President of the Alaska Bar Association I recognize and accept the responsibility we have to provide counsel, particularly in cases of broad public significance, and if the *Wilderness Society Et Al v Morton* is transferred to Alaska, our Bar will undertake to obtain for the Plaintiffs a *free* selection, on a basis acceptable to them from among the qualified counsel available.

The gist of the above is that one of the most vital points argued on the whole issue of whether to transfer venue to Alaska was the availability of *free* counsel to plaintiffs in Washington, D.C., and that to transfer venue meant as a practical matter that plaintiffs could not maintain their suit because of the absence of free counsel. When the President of the Alaska Bar argued the availability of counsel in Alaska, he did it on the *sine qua non* assumption of counsel "without compensation."

Plaintiffs represented to the District Judge that plaintiffs' counsel had received no compensation, expected to receive no compensation, and that competent counsel without fee were only available in Washington, D.C. Had it been represented to the District Court that plaintiffs' counsel would seek and be awarded, not only a fee equal to actual attorneys' costs incurred, but a fee in excess of "the amount actually paid or owed by appellants" (Majority Opinion, p. 20), whether plaintiffs prevailed on their principal legal issues or not, *then the question of change of venue would have stood in a dramatically different light before the District Judge.* Plaintiffs could not have argued they would be deprived of counsel, either those already chosen or others, by a change in venue to Alaska or any other place. The lively expectation of such fees as may now be awarded would have brought many lawyers to plaintiffs' side, either in Alaska or elsewhere.

We feel that counsel should be held to the solemn representations they made to the court that the legal services they had rendered and would render in this case would be furnished gratuitiously. For the plaintiffs now to claim and be awarded attorneys' fees, in direct contradiction to their sworn representations to the court in July 1971, is intolerable.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1973

Civil Action No. 928-70

Nos. 72-1796, 72-1797 & 72-1798

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., FRIENDS OF THE EARTH and DAVID ANDERSON, CANADIAN WILD LIFE FEDERATION and THE CORDOVA DISTRICT FISHERIES UNION, *Appellants*

v.

ROGERS C. B. MORTON, Secretary of the Interior, EARL L. BUTZ, Secretary of Agriculture and ALYESKA PIPELINE SERVICE COMPANY and STATE OF ALASKA

Before: BAZELON, Chief Judge, and WRIGHT, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, Circuit Judges, sitting *en banc*.

ORDER

(Filed April 4, 1974)

On consideration of the bills of costs and memoranda filed with respect thereto, it is

ORDERED by the court *en banc* that all expenses requested by appellants Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth are approved. Costs therefore are hereby taxed in favor of the aforesaid appellans, in the amount of $11,051.65 against Alyeska Pipeline Service Company, the State of Alaska, and the United States of America. It is

FURTHER ORDERED by the court *en banc* that the bill of costs is hereby remanded to the District Court for the

setting of attorneys' fees in accordance with the opinion filed herein this date.

Per Curiam
For the Court
/s/ Hugh E. Kline
Clerk

Date: April 4, 1974

Opinion for the court filed by Circuit Judge Wright.
Dissenting opinion filed by Circuit Judge MacKinnon.
Dissenting opinion, in which Circuit Judges MacKinnon and Robb join, filed by Circuit Judge Wilkey.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1973

Nos. 72-1796, 72-1797 & 72-1798

Civil Action No. 928-70
Civil Action No. 861-71

The Wilderness Society, Environmental Defense Fund, Inc., Friends of the Earth, and David Anderson, Canadian Wild Life Federation, and The Cordova District Fisheries Union, *Appellants*

v.

Rogers C. B. Morton, Secretary of the Interior, Earl L. Butz, Secretary of Agriculture, and Alyeska Pipeline Service Company, and State of Alaska

Before: Wright, Circuit Judge

ORDER

(Filed June 21, 1974)

It is Ordered, *sua sponte*, that the opinion for the court filed herein on April 4, 1974 be, and it is hereby, amended as follows:

On page 4, in the 6th line from the bottom, insert after "*e.g.*," "*Brandenburger* v. *Thompson*, 9 Cir., — F.2d — (No. 72-2224, decided March 25, 1974);"

On page 19, delete the word "and" in the 10th line from the bottom of text, change the period after the word "issues" in the 9th line from the bottom of text to a comma, and insert thereafter "and the incentive factor."

On page 19, in the 3rd line from the bottom of text, change the period after "(1964)" to a semicolon and insert thereafter "*Kiser* v. *Miller*, D. D.C., 364 F.Supp. 1311 (1973)."

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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1977

ALYESKA PIPELINE SERVICE COMPANY,
Petitioner,

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., AND FRIENDS OF THE EARTH,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI FILED ON JULY 3, 1974 CERTIORARI GRANTED OCTOBER 15, 1974

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Bill of Costs of Appellants, The Wilderness Society, Environmental Defense Fund, Inc. and Friends of the Earth, February 23, 1973 209

Notation: The Opinion and Judgment of the United States Court of Appeals are included in the Petition for a Writ of Certiorari, App. 1a-40a, and are reported at 495 F.2d at 1026 (1974).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1977

ALYESKA PIPELINE SERVICE COMPANY,
Petitioner,

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., AND FRIENDS OF THE EARTH,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

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APPENDIX

DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 72-1796

ALYESKA PIPELINE SERVICE COMPANY, *Petitioner*

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., AND FRIENDS OF THE EARTH, *Respondents*

DATE	FILINGS—PROCEEDINGS
8-22-72	Certified Original Preliminary Record (2 vols. transcript) (n-5)
8-23-72	4—Appellant's motion for consideration on briefs filed below and for expedited hearing (p-23)
8-25-72	Certified Original Record (volumes 1-12) (8 volumes of transcripts, 3 boxes containing depositions, briefs and exhibits) (n-3)
8-29-72	4—Response of Federal appellees to appellants' motion for consideration on briefs filed below, and for expedited hearing, and suggestion that such hearing be held en banc (m-29)
8-29-72	4—Response of State of Alaska to motion to expedite hearing and for consideration of briefs below (m-29)
8-29-72	4—Response of Alyeska Pipeline Service Company to motion to expedite appeal and for consideration of briefs below, and to the government's suggestion for hearing en banc (m-29)
9-1-72	Per Curiam order sua sponte, consolidating with Nos. 72-1797 and 72-1798, for all purposes; granting appellants' motions for consideration on briefs filed below and expedited hearing, and counsel for the parties shall promptly file with this Court 20 copies of the briefs filed in the District Court; suggestions for hearing en banc are submitted and a ruling thereon will be made promptly; Leventhal and Wilkey, CJ
9-6-72	4—Motion of United Distribution Companies for leave to file brief for amicus curiae (m-6)
9-12-72	20—Brief for Appellants David Anderson and the Canadian Wildlife Federation (m-12)
9-12-72	20—Reply brief for Appellants David Anderson and the Canadian Wildlife Federation (m-12)
9-12-72	20—Brief for appellee State of Alaska (m-12)
9-13-72	20—Brief for appellee Morton (m-13)
*9-12-72	20—District Court Brief for State of Alaska (National Environmental Policy Act issues in District Court filed pursuant to order 9-1-72) (m-12)
9-13-72	20—Appellees' Morton memorandum of points and authorities in response to issues raised in District Court motion for partial summary judgment filed May 12, 1972 (filed in brief form pursuant to order 9-1-72) (m-13)
9-14-72	20—Appellee's Alyeska Pipeline Service Co., brief filed in the District Court (filed in Brief form pursuant to order 9-1-72) (National Environmental Policy Act Issues) (m-14)
9-14-72	20—Appellee's Alyeska Pipeline Service Co., brief filed in the District Court (Mineral Leasing Act and Terminal Facility issues) (filed in Brief form pursuant to order 9-1-72) (m-14)
9-14-72	10—Volumes of supporting documents to appellee Alyeska Pipeline Service Co., brief (covering Mineral Leasing Act and Terminal Facility Issues)
9-14-72	10—Volumes of supporting documents to appellee Alyeska Pipeline Service Co., brief (covering National Environmental Policy Act Issues)
9-15-72	Per Curiam order en banc granting suggestion that cases be considered by the Court sitting en banc and cases are hereby scheduled for argument before the Court sitting en banc at 10:00 a.m. on Friday, October 6, 1972; CJ Bazelon, Wright, McGowan, Tamm, Lev-

enthal, Robinson, MacKinnon, Robb and Wilkey, CJ; CJ McGowan did not participate in order

9-18-72 10—Joint Appendix

9-21-72 Per Curiam order granting motion of United Distribution Companies for leave to participate amicus curiae and to proceed on the memorandum and motion by Cordova District Fisheries Union to correct misnomer of appellant's brief. CJ Bazelon, Wright, McGowan, Leventhal, Robinson, MacKinnon, Robb and Wilkey: Judge McGowan did not participate

DATE FILINGS—PROCEEDINGS

9-21-72 Per Curiam order granting petition of United Distribution Companies for leave to participate amicus curiae and to proceed on the memorandum amicus curiae filed below, also motion by the Cordova District Fisheries Union to correct Misnomer of appellant's brief. CJ Bazelon, Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ, Judge McGowan did not participate in order

9-21-72 20—briefs amicus curiae of United Distribution Companies (m-6)

9-21-72 11—Joint motion of all parties to extend time for oral argument and for more than two counsel to be heard for each side

9-25-72 4—Motion of United Distribution Companies for leave to withdraw the name of one of the companies listed as a member of the United Distribution Companies (m-25)

10-2-72 Per Curiam order granting motion of United Distribution Companies for leave to withdraw the name of Illinois Light Company as a member of United Distribution Companies. CJ Bazelon, Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, and Wilkey, CJ, Circuit Judge McGowan did not participate in order

10-2-72 Per Curiam order granting joint motion for additional time and for more than two counsel to be heard

for each side; amending order of September 15, 1972 to reflect the time of oral argument to be 9:30 a.m. instead of 10:00 a.m., CJ Bazelon, Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ; Circuit Judge McGowan did not participate in order

10-3-72 4—Motion of Alyeska Pipeline Service Co., for leave to file supplemental joint appendix (m-3)

10-6-72 Argued before CJ Bazelon, Wright, Tamm, Leventhal, Robinson, MacKinnon and Wilkey, CJ, the court announced that Circuit Judge Robb is a member of the en banc court but is unable to be present, the case will be submitted to him on the briefs and tape recording; on motion by Mr. Thomas F. Hogan, Mr. Warren W. Matthews, Jr. a member of the bar of the Supreme Court of Alaska was allowed to argue pro hac vice for appellant, Cordova District Fisheries Union; on motion by Mr. William H. Allen, Mr. John E. Havelock a member of the Supreme Court of Alaska was allowed to argue for appellee State of Alaska; counsel for the parties were granted leave to file the transcript of the argument in the District Court

10-18-72 Order per CJ Bazelon en banc, granting joint motion for permission to file a supplement joint appendix and Clerk is directed to file the supplemental joint appendix lodged herein on October 3rd; CJ Bazelon, and Wright, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ

10-18-72 10—Joint supplemental appendix (

10-30-72 Per Curiam order directing Clerk to file in these consolidated cases the letter of October 4, 1972 from counsel for United Distribution Co., requesting that the name of Consolidated Natural Gas System, and affiliates, together with the name of their attorney, Mr. H. P. Sullivan, be expunged from the memorandum amicus curiae of United Distribution Companies filed on July 31, 1972; the request is granted; CJ Bazelon

and Wright, Leventhal, Robinson, Robb and Wilkey, CJ

10-30-72 Letter dated October 4, 1972, from United Distribution Co.—granted

11-15-72 4—joint motion for consolidation of numbers and captions in opinion

11-30-72 4—appellees' motion for leave to file supplemental information (m-30)

12-4-72 4—Response of the Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth to secretary's motion for leave to file supplemental information (m-??)

12-11-72 Per Curiam order by the Clerk for the Court granting motion of the Secretary of the Interior for leave to file supplemental information and Clerk is directed to file Supplemental information

12-11-72 4—Supplemental information for the Secretary of Interior (m-20)

DATE FILINGS—PROCEEDINGS

1-5-73 Order per CJ Bazelon granting joint motion for consolidation of numbers and captions and the caption in the consolidated cases is hereby amended to read as follows; Nos. 72-1796, 72-1797 and 72-1798 The Wilderness Society, Environmental Defense Fund, Inc., Friends of the Earth, and David Anderson, Canadian Wild Life Federation and The Cordova District Fisheries Union, Appellants v. Rogers C. B. Morton, Secretary of the Interior, Earl L. Butz, Secretary of Agriculture and Alyeska Pipeline Service Company, and State of Alaska

2-9-73 Opinion for the Court by Circuit Judge Wright.

2-9-73 Opinion by Circuit Judge MacKinnon, Concurring in part and dissenting in part.

2-9-73 Opinion by Circuit Judge Robb, concurring in part and dissenting in part.

2-9-73 Opinion by Circuit Judge Wilkey, concurring in part and dissenting in part.

2-9-73 Judgment vacating judgment of the District Court and remanding case for further consideration (n)

2-21-73 Receipt dated February 21, 1973 from the Clerk, District Court for the twelve volumes of original record with reporter's transcripts (8 vols.) and three boxes of depositions, briefs and exhibits also preliminary record with reporter's transcript (2 vols.)

2-23-73 1—Bill of Costs of the Wilderness Society, Environmental Defense Fund, Inc., and The Friends of the Earth (p-23)

3-1-73 4—Appellee's motion for stay of Mandate Pending application for a writ of Certiorari (p-1)

3-2-73 4—Appellee's Alyeska Pipeline Service Co. motion to defer action on Appellants' bill of costs (p-2)

3-6-73 4—Appellants' opposition to motion of Alyeska Pipeline Service Company for stay of Mandate and Deferal of Action Costs (p-6)

3-7-73 4—Motion of Federal Appellee to file response to the appellants' bill of costs time having expired (m-7)

3-19-73 Notice of filing certiorari in Supreme Court on March 9, 1973, in S.C. # 72-1227, 72-1228, and 72-1229

3-27-73 Per Curiam order en banc granting motions of appellee Alyeska Pipeline Service Co. for stay of mandate pending application to the Supreme Court for a writ of certiorari motion of appellee Alyeska Pipeline Service Co. for deferral action on appellants' bill of costs; motion for permission to file a response by the Federal Appellees to appellants' bill of costs out of time; Clerk is directed to stay the issuance of the mandate for a period of 30 days, the stay granted herein shall be subject to the provisions of Rule 41 (b) of the FRAP; CJ Bazelon; and Wright, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ

3-27-73 4—Response by the Federal appellees to the appellant's bill of costs (m-7)

4-5-73 Certified Copy of Supreme Court denying certiorari on April 2, 1973 in S.C. #72-1227, 72-1228 and 72-1229

4-9-73 4—Appellee's Alyeska Pipe Line Service Co. motion to set time to file reply to Bill of Costs to April 20th (p-9)

4-19-73 Per Curiam order en banc granting appellee's (Alyeska Pipeline Service Co.) motion to set the time for filing responses to appellants' bill of costs and the time for filing responses to the bills of costs filed on behalf of appellants' is extend to April 20, 1973; CJ Bazelon; Wright, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ

4-20-73 10—Federal Appellees' supplemental response to the bills of costs filed by appellants (p-20)

DATE FILINGS—PROCEEDINGS

4-20-73 10—Alyeska Pipeline Service Co., response to appellants' bill of costs (m-20)

4-20-73 10—State of Alaska's response to appellants' bill of costs (p-20)

4-25-73 10—Motion of Wilderness Society Environmental Defense Fund, Inc. and The Friends of the Earth to extend time to file response to appellees' bill of costs (p-25)

(B)4-30-73 Clerk's order granting motion of appellants The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth to extend time to file responses to Bill of Costs to May 2nd

(I)5-2-73 4—Response of The Wilderness Society, EDF, Inc., and Friends of the Earth to the bill of costs (p-2)

(S)5-4-73 4—Response by Appellant, Cordova District Fisheries Union, to Appellees' oppositions to Cordova District Fisheries Union Bill of Costs (m-2) (OK HK)

(M)5-9-73 Per Curiam order en banc that Clerk is directed to issue the opinion and certified copy of this Court's judgment to the District Court forthwith; CJ Bazelon, and Wright, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ

5-9-73 Copy of opinion and certified copy of judgment issued to the District Court.

(S)5-23-73 10—Appellants' motion for leave to file supplemental information (Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth) (p-23)

(M)6-6-73 Order Per CJ Bazelon granting appellants' motion for leave to file supplemental information; and the Clerk is directed to file the opinion of the U.S. Supreme Court, in Hall, et al v. Cole, No. 72-630

(M)6-6-73 10—Supreme Court opinion (m-23)

(S)6-11-73 10—Appellants' motion for leave to file supplemental information (Wilderness Society, Environmental Defense Fund, and Friends of the Earth) (m-11)

(M)6-13-73 Per Curiam order en banc, sua sponte, that the pending motions with respect to appellants' bill of costs shall be argued before the Court sitting en banc at 11:00 A.M. on Wednesday, July 11, 1973; each side be allotted 15 minutes for oral argument; the total time allotted for argument is 30 minutes; CJ Bazelon, and Wright, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ

(M)6-26-73 Per Curiam order en banc granting appellant's motion for leave to file supplemental information; CJ Bazelon; and Wright, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ

(M)7-10-73 10—Appellants' motion for leave to file supplemental information (p-10)

(B)7-11-73 Per Curiam order en banc granting appellants' motion for leave to file supplemental information; Bazelon, CJ; Wright, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ

(B)7-11-73 1—Supplemental information

(M)7-11-73 Reargued before CJ Bazelon, Wright, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ; the case was called for hearing on motions for bill of costs filed by Friends of the Earth and The Cordova District Fisheries Union

(S)7-13-73 10—Appellants' motion for leave to file supplemental information (m-13)

(B)7-26-73 Order per CJ Bazelon granting appellants' motion for leave to file copy of order entered in the United States District Court for the District of Columbia in *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, Civil Action 2506-70, D.D.C. June 22, 1973

(B)7-26-73 4—Supplemental information (order of *Pyramid Lake Paiute Tribe of Indians* v. *Morton*)

(S)10-15-73 Letter from Appellants advising of additional authorities pursuant to local Rule 8(g)

(S)11-19-73 11—Letter from Appellants' advising of additional authorities pursuant to local Rule 8(g)

(G)1-25-74 Letter from Dennis M. Flannery advising of additional authorities pursuant to local Rule 8(g)

DATE FILINGS—PROCEEDINGS

(M)3-21-74 Per Curiam order en banc, sua sponte, that the Clerk of the District Court is directed to certify and transmit Item Nos. 61 thru 80 to this Court as a supplemental record on appeal as promptly as the business of his office permits: CJ Bazelon; Wright, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ

(G)3-21-74 Certified Original Supplemental Record (no transcript) (n)

4-4-74 Opinion for the Court filed by Circuit Judge Wright.

4-4-74 Dissenting opinion filed by Circuit Judge MacKinnon.

4-4-74 Dissenting opinion in which Circuit Judges MacKinnon and Robb join, filed by Circuit Judge Wilkey.

4-4-74 Per Curiam order by the Clerk approving all expenses requested by appellants. Costs therefore are taxed in the amount of $11,051.65 against Alyeska Pipeline Service, State of Alaska and USA. Bill of costs is remanded to District Court for setting of Attorneys fees in accordance with the opinion of this Court filed this date.

4-11-74 Receipt dated April 9, 1974 from the Clerk, District for the supplemental record containing exhibits

(P)4-29-74 Certified copies of orders and opinion issued to District Court.

(P)4-29-74 Certified bill of costs for appellants Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth issued to District Court.

6-12-74 Order per Circuit Judge Wright amending opinion of 4-4-74.

(L)7-8-74 Notice from Supreme Court in filing petition for certiorari in S.C. #73-1977 on July 3, 1974

(L)10-23-74 Certified copy of order from Supreme Court granting petition for certiorari in S.C. #73-1977 on October 15, 1974

(G)11-21-74 Letter from Clerk of Supreme Court requesting original record and pleadings before this court

(M)12-9-74 Preliminary Record—(2 vol. of transcript) Original Record (vols. I-V) (8 vols. of transcript with the original record and supplemental Record (Exhibits —2 boxes) returned by the Clerk of the U.S. District Court

(M)12-2-74 Order per CJ Bazelon the Clerk of the District Court for the District of Columbia shall return the record to this Court as promptly as the business of his office permits; and the Clerk of this Court shall forward the record to the Supreme Court as promptly as the business of his office permits

(M)12-2-74 Certified copy of the above order sent to Clerk, U.S. District Court

(M)12-2-74 Order per CJ Bazelon that the Clerk is directed to prepare a certified record, consisting of the following; 1. a copy of the appendices filed September 13, 1974; 2. a copy of the Joint appendix filed September 18, 1972; 3. a copy of the supplemental appendix filed October 18, 1972; 4. a copy of the opinion and judgment filed February 9, 1973; 5. a copy of the opinions and order filed April 4, 1974; 6. a copy of this

order; the Clerk is directed to transmit the certified record to the Clerk of the Supreme Court

(M)12-10-74 Certified copy of the above order and the Preliminary Record (2 vol. of trans.) Original Record vols. I-V (8 vol. of trans.) and Supplemental record (2 boxes of exhibits) sent to Clerk, Supreme Court

(M)12-10-74 Receipt returned from Clerk, Supreme Court for all of the above records, etc.

DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

WILDERNESS SOCIETY V. HICKEL

(CA: No. 928-70)

DATE	PROCEEDINGS
1970	Deposit for cost by
Mar. 26	Complaint, appearance; Appendix A, B, C, D; filed.
Mar. 26	Summons, copies (3) and copies (3) of Complaint issued Deft 3-27; DA 3-31; AG 3-27-70.
Mar. 26	Motion of pltffs. for Preliminary Injunction; Memorandum of Law; Exhibit. M.C.; filed.
Mar. 26	Motion of pltffs. to consolidate; P & A's. M.C.; filed.
Mar. 26	Certificate of Service, March 26, 1970; filed.
Mar. 30	Affidavits (3); p/s 3/30/70; filed.
Mar. 31	Affidavits (4) by pltf.; p/s 3/31/70; filed.
Mar. 31	Notice by pltfs. of hearing; p/s 3/31/70; filed.
Apr. 1	Affidavits (5) by pltfs.; p/s 4/1/70; filed.
Apr. 1	Affidavit of John W. Thomson; c/s 3/31/70; filed.
Apr. 1	Motion of pltfs. for temporary restraining order; exhibit; affidavit; P&A; with exhibit; p/s 4/1/70; filed.
Apr. 1	Affidavit of Gary W. Crosby; p/s 4/1/70; filed.
Apr. 2	Stipulation extending time for deft. to respond to motion for preliminary injunction to 4/7/70; filed.

Apr. 3	Affidavit of Sigurd F. Olson; c/m 4/3/70; filed.
Apr. 3	Motion of pltfs. for temporary restraining order, endorsed: "Balancing the Equities as it must and assuming standing to sue, the application is denied. Hearing on preliminary injunction set for 4-13-70" (fiat) (N) McGuire, J.
Apr. 6	Notice of appeal by pltfs. from order of 4-3-70; copy mailed to Herbert Pittle; deposit $5.00 by Moorman; filed.
Apr. 6	Copy of corrected page 18 of memorandum of law in support of motion for preliminary injunction by pltf.; c/m 4-2-70; filed.
Apr. 6	Amended complaint; appendix A, B, C, D, & E; p/s 4-6-70; filed.
Apr. 7	Transcript of proceeding 4-3-70; Reporter Joan E. Warren (Court's Copy); filed.
Apr. 7	Brief by deft. in opposition to motion for preliminary injunction; p/s 4/7/70; affidavits of Jack O. Horton with exhibits 1 thru 23; affidavit of Jack O. Horton # 2; affidavit of Robert S. Burd, Spencer H. Smith, William T. Pecola, Keith H. Miller, Robert L. Beardsley, W. G. Stroecker, R. W. Groff, Edgar M. Clausen, M. B. Ringstad, C. W. Baer, E. S. Albright, James A. Thompson, Jr. and Thomas J. Moore and William I. Waugaman; filed.
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Apr. 9	Reply of pltfs. and rehearing memorandum; Exhibit A, B, C; attachments (2) to affidavit; c/m 4/9/70; filed.
Apr. 16	Objections of defendant to plaintiff's proposed form of preliminary injunction; c/m 4-16-70; M.C.; filed.
Apr. 15	Stipulation of voluntary dismissal of appeal from denial of motion for temporary restraining order. (N) N/371; McGuire, J.
Apr. 22	Objections of deft. to proposed findings of fact and conclusions of law; c/m 4/22; M.C.; filed.

Apr. 24—Injunction undertaking of pltf. in sum of $100.00 with National Surety Corp. approved; filed.

Apr. 23—Proposed Findings of Fact and Conclusions of Law of pltf.; filed.

Apr. 23—Findings of Fact and Conclusions of Law. (N); Hart, J.

Apr. 23—Preliminary injunction $100.00 bond; U.S. Marshall to serve a copy of this Order forthwith. (N) Serv. 4-29-70. Hart, J.

May 20—Interrogatories of pltfs. to deft; c/m 5-19-70; filed.

May 26—Answer of deft. to amended complaint; c/m 5/25; appearance of Herbert Pittle; filed.

May 26—Calendared (AC/N)

May 28—Motion of deft. for enlargement of time to respond to interrogatories; P&A; c/m 5/28; M.C.; filed.

June 2—Opposition of deft. to motion for enlargement of time to respond to interrogatories; p/s 6/2/70; filed.

June 5—Motion of deft. for enlargement of time to answer interrogatories of time to answer interrogatories to June 30, 1970. granted. (fiat) (N) Hart, J.

June 12—Interrogatories of pltf. to deft.; c/m 6/11/70; filed.

June 22—Motion of deft. for enlargement of time to object or answer second set of interrogatories; P&A; c/m 6/19/70; M.C.; filed.

June 30—Objections of deft. to interrogatories; c/m 6/30/70; M.C.; filed.

June 30—Answer of deft. to interrogatories; c/m 6/30/70; filed.

Jul. 13—Stipulation as to corrections to transcript of proceedings on pltfs. motion for preliminary injunction.

Jul. 20—Request of pltf. for deft. to produce for inspection certain documents; c/m 7/17/70; filed.

Jul. 24—Motion of pltfs. to compel answers to interrogatories; P&A; c/m 7/22; M.C.; filed.

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Jul. 27—Motion of deft. for enlargement of time to object to or answer second set of interrogatories; P&A; c/m 7-27-70; M.C.; filed.

Jul. 31—Stipulation extending time for deft. to oppose motion to compel answers to first set of interrogatories to August 10, 1970; filed.

Aug. 10—Opposition of deft. to motion to compel answers to interrogatories; c/m 8/10/70; filed.

Aug. 12—Supplemental answers of deft. to interrogatories; c/m 8/11/70; filed.

Aug. 20—Answer of deft. to request to produce; c/m 8/17; filed.

Aug. 20—Request of pltfs. to admit, pursuant to Rule 36, that the letter appearing in the Fairbanks Daily News Miner on July 20, 1970 is a true copy of a letter from deft. to William Randolph Hearst, Jr.; exhibit; c/m 8/19; filed.

Sep. 1—Motion of deft. for enlargement of time to object or answer second set of interrogatories; P&A; c/m 8/28; M.C.; filed.

Sep. 10—Transcript of proceedings—pages 1-50; E. Alfred Kaufman, Reporter (Court's Copy); filed.

Sep. 30—Request of pltfs. for production of documents; appendix 1; c/m 9/25/70; filed.

Oct. 6—Appearance of Victor H. Kramer as counsel for pltfs. c/m 10-1-70; filed.

Oct. 26—Answer of deft. to pltfs. request to produce; c/m 10-23-70; filed.

Oct. 28—Motion of deft. for enlargement of time to respond to interrogatories; P&A; c/m 10-27-70; M.C.; filed.

Oct. 28—Answer of deft. to interrogatories (II) (Partial); Appendix A, B, C, and D; c/m 10-27-70; filed.

Oct. 28—Objections of deft. to interrogatories; P&A; c/m 10-27-70; filed.

Nov. 10—Motion of pltfs. to compel answers to interrogatories and inspection of documents; P&A; affidavits (3); c/m 11-10-70; filed.

Nov. 24—Response of deft. to pltf's. motion to compel answers to interrogatories and inspection of documents; exhibits (2); c/m 11-23-70; filed.

Nov. 30—Answers of deft. to interrogatories; c/m 11-27-70; filed.

Dec. 1—Memorandum of pltfs. in reply to defts. response to pltfs. motion to compel answers to interrogatories and inspection of documents; affidavit; exhibits (2); c/m 11-30-70; filed.

Dec. 8—Supplemental memorandum of pltfs. in support of their motion to compel answers to interrogatories and inspection of documents; c/m 12-8-70; filed.

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Dec. 15	Supplemental motion of pltfs. to compel answers to pltfs. interrogatories; P&A; c/m 12-15-70; M.C.; filed.
Dec. 15	Request of pltfs. to supplement responses to interrogatories and requests to produce; c/m 12-15-70; filed.
Dec. 30	Opposition of deft. to pltfs. supplemental motion to compel answers to interrogatories and inspection of documents; c/m 12-24-70; filed.
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Jan. 8	All discovery motions continued to 2-26-71 at 1:30 p.m.; filed.
Feb. 22	Interrogatories of pltf. to deft. as amended; c/m 2-19-71; filed.
Feb. 23	Consent order directing deft. answer plaintiffs interrogatories (II) not later than 4-22-71; plaintiffs may file motion to compel production of documents as to which a claim of privilege has been asserted. (N) Hart, J.
Apr. 23	Answer of deft. to interrogatories (II) as amended; c/m 4-22-71; filed.

May 4—Consent order extending time for pltfs. to request production of documents to and including 5-13-71. (N) Hart, J.

May 13—Request of pltfs. to produce documents for inspection and copying; p/s 5-13-71; filed.

May 27—Response of deft. to pltfs. request to produce; filed.

*May 27—Consent order enlarging time for deft. to produce all documents identified in pltfs. request to produce to and including the times specified in said response for each document. (N) Hart, J.

June 29—Certificate of service of exhibits and motion to change venue mailed 6-29-71; exhibits A, B, C and exhibit 1; filed.

*June 28—Motion of deft. to change venue; P&A; c/m 6-28-71; M.C.; filed.

July 2—Motion of pltfs. for enlargement of time to respond to motion for change of venue; P&A; p/s 7-2-71; M.C.; filed.

July 6—Motion of pltfs. for enlargement of time to respond to defts. motion to change venue to 7-19-71, granted. (Fiat) (N) Hart, J.

July 19—Memorandum of P & A of Pltfs. in opposition to motion for change of venue; attachments a, b, c, d, e, f, & g; affidavits (5); P/S 7-19-71; filed.

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July 27	Response of deft. to pltfs. memorandum of P&A in opposition to motion to change venue; attachment 1; c/m 7-27-71; filed.
July 30	Supplemental memorandum of pltf. in opposition to motion for change of venue; p/s 7-30-71; filed.
July 30	Affidavit of Peter LaBate; filed.
July 30	Motion of deft. to change venue argued and denied. (OTBP) (Reporter G. Nevitt) Hart, J.
Aug. 5	Appearance of Dennis M. Flannery as counsel for pltfs. and also Saunders Cook Hillyer; filed.

Aug. 9—Order denying defts. motion for change of venue. (N) Hart, J.

Aug. 13—Certificate of mailing; copy of praecipe filed 8-5-71 on 8-10-71; filed.

Aug. 20—Motion of Alyeska Pipeline Service Company to intervene as a deft.; attachment 1; P & A; appendix A & B; Exhibit; P/S 8-20-71; M.C.; filed.

Aug. 24—Appearance of John F. Drenelt counsel for pltfs.; c/m 8-24-71; filed.

Aug. 27—Memorandum by pltfs. in response to motion of Alyeska Pipeline Service Company to intervene as a deft.; Exhibit A & B; c/m 8-27-71; filed.

Aug. 30—Motion of the State of Alaska for leave to Intervene; P & A's; Exhibit; Affidavit; c/m 8-20-71; M.C.; appearance of Mr. Kenneth Frank, Asst. Atty. Gen.; (State Capitol, Pouch, K Juneau, Alaska.) filed.

Sep. 7—Memorandum of pltf. in response to motion of State of Alaska to intervene; Exhibit A; c/m 9-7-71; filed.

Sep. 8—Appearance of William H. Allen and Richard D. Copaken as attorneys for the State of Alaska, intervenor; filed.

Sep. 10—Order motion of State of Alaska to intervene as a deft. on condition that Alaska file pleading no later than 9-30-71. (N) Hart, J.

Sep. 20—Order granting Alyeska Pipeline Service Co.'s motion to intervene; for production of documents. (N) Jones, J.

Sep. 30—Answer of intervenor, State of Alaska, to amended complaint; cross-claim vs. deft. C. B. Morton; c/m 9-30-71; filed.

Oct. 14—Request of pltf. for production of documents; c/m 10-14-71; filed.

Oct. 14—Request of pltf. for admissions; c/m 10-14-71; filed.

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Nov. 11—Notice of pltfs. to take deposition of Dr. Frederick J. Sanger; c/m 11-11-71; filed.

Nov. 15—Motion of David Anderson and the Canadian Wildlife Federation for leave to intervene; P&A; c/m 11-15-71; M.C. Deposit $5.00 by Berlin; appearance of Berlin, Roisman and Kessler; filed.

Nov. 15—Motion of deft. for order determining that action be maintained as a class action; P&A; c/m 11-15-71; M.C.; filed.

Nov. 16—Motion of pltf. to clarify preliminary injunction; P&A; table of content; memorandum; exhibits A-G; p/s 11-16-71; draft environmental statement; M.C.; filed.

Nov. 17—Motion of pltfs. for protective order; P&A; affidavit; c/m 11-17-71; M.C.; filed.

Nov. 17—Answer of defts. to pltfs. request for production of documents; c/m 11-16-71; filed.

Nov. 17—Answer of defts. to request for admissions; c/m 11-16-71; filed.

Nov. 18—Response of pltfs. to defts. motion for protective order; attachment; affidavit; c/m 11-18-71; filed.

Nov. 18—Transcript of proceedings 11-18-71, pages 1-8. Reporter E. Kaufman. (Clerk's copy); filed.

Nov. 19—Order directing that deposition of Dr. Sanger not be taken on 11-19-71 and not until after he has completed his work on NEPA impact statement; counsel for deft. shall then notify pltfs. for said deposition. (N) Hart, J.

Nov. 22—Motion of deft. #1 for extension of time to respond to motion to clarify preliminary injunction; c/m 11-19-71; M.C.; filed.

Nov. 22—Motion of deft. #1 for extension of time to respond to motion to intervene; c/m 11-19-71; M.C.; filed.

Nov. 22—Motion of intervenor, State of Alaska for extension of time to respond to pltfs. motion for preliminary injunction; c/m 11-22-71; M.C.; filed.

Nov. 22—Motion of intervenor, State of Alaska to extend time to respond to motion by David Anderson and Canadian Wildlife Federation to intervene; c/m 11-22-71; M.C.; filed.

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Nov. 22—Motion of deft. Alyeska Pipeline for extension of time to respond to motion by David Anderson, et al to intervene; c/m 11-22-71; M.C.; filed.

Nov. 22—Motion of deft. Alyeska Pipeline for extension of time to respond to pltfs. motion to clarify preliminary injunction; c/m 11-22-71; M.C.; filed.

Nov. 23—Motion of pltfs. for extension of time to respond to motion by David Anderson and Canadian Wildlife to intervene; c/m 11-23-71; M.C.; filed.

Nov. 23—Motion of pltfs. for extension of time to respond to defts. motion for order determining that action shall be maintained as a class action; c/m 11-23-71; M.C.; filed.

Nov. 23—Memorandum of intervenor, State of Alaska, in response to defts. motion for order determining that action shall be maintained as a class action; c/m 11-23-71; filed.

Nov. 23—Memorandum of Points and Authorities submitted by deft. Alyeska Pipeline Service Co. in support of defts. motion to have this action maintained as a class action; appendix 1; c/m 11-23-71; filed.

Nov. 23—Motion of intervenor, State of Alaska, for extension of time to 11-23-71 to respond to motion of David Anderson and Canadian Wildlife Federation to intervene granted. (Fiat)(N) Hart, J.

Nov. 23—Motion of deft. Rogers C. B. Morton for extension to 12-10-71 of time to respond to pltfs. motion to clarify preliminary injunction granted. (Fiat)(N) Hart, J.

Nov. 23—Motion of deft. Alyeska Pipeline Service for extension of time to 11-30-71 to respond to motion of

David Anderson and The Canadian Wildlife Federation to intervene. (Fiat)(N) Hart, J.

Nov. 23—Motion of deft. Rogers C. B. Morton for extension of time to 11-30-71 to respond to motion of David Anderson and the Canadian Wildlife Federation to intervene. (Fiat)(N) Hart, J.

Nov. 23—Motion of intervenor, State of Alaska, to extend to 12-10-71 time to respond to pltfs. motion to clarify preliminary injunction. (Fiat)(N) Hart, J.

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Nov. 23—Motion of deft. Alyeska Pipeline Service to extend to 12-1-71 time to respond to pltfs. motion to clarify preliminary injunction (Fiat)(N); filed.

Nov. 29—Transcript of proceedings 7-30-71, vol. 1, pages 1-41. Gerald Nevitt, Reporter (Court's copy); filed.

Nov. 30—Memorandum of pltfs. in response to motion by David Anderson and the Canadian Wildlife Federation to intervene as plts.; c/m 11-30-71; filed.

Nov. 30—Memorandum of pltfs. in opposition to motion for order determining that this action shall be maintained as a class action; c/m 11-30-71; filed.

Nov. 30—Memo of intervenor State of Alaska in opposition to motion of David Anderson and Canadian Wildlife to intervene; c/m 11-30-71; filed.

Nov. 30—Memo of Alyeska Pipeline Service Co. in opposition to motion by David Anderson and Canadian Wildlife to intervene; c/m 11-30-71; filed.

Nov. 30—Memo of deft. in opposition to motion of David Anderson and Canadian Wildlife to intervene; filed.

Dec. 1—Attachment to memorandum of Alyeska Pipeline Service Co. in opposition to motion by David Anderson and the Canadian Wildlife Federation to intervene; filed.

Dec. 1—Memorandum of points and authorities of Alyeska Pipeline Service Co. in opposition to pltfs. motion to

clarify preliminary injunction; appendix 1; c/m 12-1-71; filed.

Dec. 2—Motion of David Anderson and the Canadian Wildlife Federation to intervene, denied. (Fiat)(N) Hart, J.

Dec. 3—Answer of deft. Morton to cross-claim of intervenor State of Alaska; c/m 12-2-71; filed.

Dec. 6—Motion of David Anderson and the Canadian Wildlife Federation for rehearing and reconsideration of the denial of their motion for leave to intervene; P&A; exhibit; c/m 12-3-71; M.C.; filed.

Dec. 7—Notice of pltfs. to take deposition of Russell E. Train; c/s 12-7-71; filed.

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Dec. 7—Notice of pltfs. to take deposition of Burton W. Silcock; c/s 12-7-71; filed.

Dec. 7—Notice of pltfs. to take depositions of individuals designated by Dept. of Interior; c/s 12-7-71; filed.

Dec. 7—Notice of pltfs. to take deposition of William T. Pecora; c/s 12-7-71; filed.

Dec. 7—Notice of pltfs. to take deposition of Jack O. Horton; c/s 12-7-71; filed.

Dec. 8—Motion of pltfs. for extension of time in which to file reply memorandum; P&A's; c/m 12-7-71; M.C.; filed.

Dec. 9—Memorandum of P&A's by defts. in opposition to motion to clarify preliminary injunction; c/m 12-9-71; filed.

Dec. 9—Motion of pltfs. for extension of time to file reply memorandum, granted. (Fiat)(N) Hart, J.

Dec. 10—Memorandum of intervenor State of Alaska in opposition to pltfs. motion to clarify injunction; c/s 12-10-71; filed.

Dec. 13—Motion of deft. for protective order quashing notices for taking of depositions; P&A; affidavit; c/m 12-10-71; M.C.; filed.

Dec. 13—Opposition of pltfs. to motion for protective order quashing notices for taking of depositions; exhibits (2); c/m 12-13-71; filed.

Dec. 13—Response of Alyeska Pipeline Service Co. to motion for protective order; appendix I; c/m 12-13-71; filed.

Dec. 15—Reply of pltfs. to defts. opposition to motion to clarify preliminary injunction; exhibits A&B; c/m 12-15-71; filed.

Dec. 15—Order granting motion of deft. for a protective order; depositions not be noticed or taken until after filing of final section 102. (N) Hart, J.

Dec. 23—Transcript of proceedings 12-14-71. E. A. Kaufman, Reporter. (Court's copy); filed.

Dec. 29—Appearance of James N. Barnes as attorney for pltfs; c/m 12-29-71; filed.

Jan. 10—Supplemental exhibits (2) to pltfs. motion to clarify preliminary injunction; c/m 1-10-72; filed.

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Jan. 10—Copy of a letter 1-10-72 to case attorneys from Judge Hart; exhibits A&B and C; filed.

Jan. 18—Order denying Mo. of David Anderson and the Canadian Wildlife Federation for reconsideration of their mo. for leave to intervene. (N) Hart, J.

Jan. 18—Order denying mo. of pltfs. to clarify preliminary injunction. (N) Hart, J.

Jan. 31—Notice of appeal by Intervenors David Anderson and the Canadian Wildlife Federation from order of January 18, 1971. Deposit $5.00 by Berlin copies mailed to Herbert Pittle, Dennis Flannery, John Dienelt, Paul F. Mickey, Quinn O'Connell, John Krodell, John Havelock, and William Allen; filed.

Jan. 31—Preliminary Rec. on appeal delivered to USCA; Deposit by Mr. Berlin $1.00; Receipt from USCA for Prel. rec.; filed.

Feb. 2—Motion of pltfs. to compel production of documents; P & A; Table of cases; memorandum; With exhibits A through F; P S 2-2-72; M.C.; filed.

Feb. 8—Motion of deft. Alyeska Pipeline Service Co. for extension of time to respond to pltfs. motion to compel production of documents; c/m 2/8; M.C.; filed.

Feb. 16—Motion of pltfs. to compel production of documents; P & A; table of cases; memorandum; c/m 2-16-72; M.C.; filed.

Feb. 16—Motion of deft., Alyeska Pipeline for extension of time until Feb. 18, 1972 to respond to motion to compel production of documents, granted. (Fiat)(N) Hart, J.

Feb. 18—Memorandum of Points & Authorities of Alyeska Pipeline Service Co. in opposition to pltfs. motion to compel production of documents; c/m 2-18; filed.

Feb. 23—Answer of deft to plaintiff's motion to compel production of documents; c,/m 2-18-72; filed.

Feb. 24—Order denying pltfs. motion to compel production of documents, filed 2-2-62. (N) Hart, J.

Feb. 25—Opposition of deft's to pltffs' motion for production of a document; c/m 2-24-72; filed.

Mar. 1—Order denying pltfs' motion to compel production of certain documents filed 2-2-72. (N) Hart, J.

Mar. 8—Request of pltfs. for admissions; c/m 3/8; filed.

Mar. 30—Appearance of Thomas B. Stoel Jr. as counsel for plaintiffs; c/m 3-30; filed.

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Apr. 7—Answer of defts. to request for admissions; C/S; 4/7; filed.

Apr. 10—Answer of deft. to pltffs. request for admissions; c/m 3-8-72; filed.

Apr. 26—First amended complaint by intervenors c/m 5-25; filed.

May 11—Order granting motion of Alyeska Pipeline Service Company to consolidate C.A. 861-71 and C.A. 928-70. (N) (Original filed in C.A. 861-71) Hart, J.

May 12—Notice by defts. of intention to issue permit; c/s 5-11.

May 12—Motion of pltfs. for partial summary judgment; statement; P & A with exhibits A Thru E; Exhibit A thru E, 1, 2, 3, F, G, H, 1, 2, 3, 4, 5, 6, I, J, K; C/S 5-12. M.C.

May 16—Response of intervenors to motion for partial summary judgment; c/m 5-16.

May 17—Motion of pltffs. for leave to file amended and supplemental complaint for injunction and Declaratory Judgment; P & A's; Table of Contents; exhibit; c/m 5-16. M.C.

May 17—Motion of defts. Alyeska Pipe Line to place plaintiffs motion for partial summary judgment in obeyance; Table of Authorities; P & A; c/m 5-17. M.C.

May 17—Motion of deft. Alyeska Pipeline Service Company for scheduling of pretrial conference and related procedure; P & A; c/m 5-17.

May 19—Order granting motion of plaintiffs to file an amended and supplemental complaint. (N) Hart, J.

May 19—Motion of defts. to withhold consideration of motion for partial summary judgment by plaintiffs; c/s 5-19. M.C.

May 19—Memorandum of intervenor State of Alaska in response to motion of Alyeska Pipeline Service Company to place plaintiffs motion for partial summary judgment in obeyance; c/s 5-19.

May 19—Memorandum of intervenor State of Alaska in response to motion of Alyeska Pipeline for scheduling of pretrial conference & related procedures; c/s 5-19.

May 19—Motion of defendants for scheduling of pretrial conference & related procedures; P & A; c/s 5-19.

May 19—Motion of plaintiffs to hold in obeyance motion for scheduling of pretrial conference; exhibit; c/m 5-19. M.C.

May 19—Response of plaintiffs to motion to defer consideration of plaintiffs motion for partial summary judgment; c/m 5-19.

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May 19—Response of deft. Cordova District Fisheries Union to motion for partial summary judgment; c/m 5-17.

May 23—Transcript of proceedings 5-19-72; E. A. Kaufman Reporter (Court's copy).

May 26—Interrogatories of deft. to plaintiff.

May 30—Answer of intervenor State of Alaska to amended & supplemental complaint; c/m 5-30.

May 30—Answer to amended and supplemental complaint by deft. Alyeska Pipeline Service Co.; c/m 5-30.

June 2—Certified copy of judgment of USCA reversing judgment opinion attached.

June 5—Deposition of Frederick Sanger for plaintiffs on May 31, 1972.

June 5—Deposition of Knute Johnson on May 24, 1972. (Map attached.)

June 5—Deposition of Ross Mullens on May 24, 1972.

June 5—Deposition of James E. King for plaintiffs on May 24, 1972.

June 5—Deposition of Malcolm S. Isleid for plaintiffs on May 24, 1972.

June 5—Deposition of Edwin L. Chet Chaser for plaintiffs on May 24, 1972.

June 5—Deposition of Steven R. Smith for plaintiffs on May 24, 1972.

June 5—Answer of deft. to first amended complaint of intervenors; c/m 6-5.

June 5—Answer of deft. to amended & supplemental complaint; c/m 6-5.

June 7—Motion of defendants for protective order; P & A; c/m 6-7.

June 7—Petition of United Distribution Companies for leave to intervene; p/s 6-7. Appearance of Tilford A. Jones as counsel for intervenors, Suite 301, 7316 Wisconsin Ave., Bethesda, Md. 20014. $5.00 deposit by Jones.

June 9—Answer of Alyeska Pipeline to first amended complaint.

June 9—Interrogatories of defendant Alyeska Pipeline to intervenor plaintiffs; C/S 6-9.

June 9—Transcript of proceedings 6-7-71, Reporter Joan C. Blair (Court's Copy).

June 13—Petition of United Distribution Company for leave to participate Amicus Curiae; c/m 6-13. M.C.

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June 14—Order directing all parties serve any additional requests for production on or before 6-16-72; on or before 6-19-72 government make available to all parties certain documents; discovery be completed on or before 6-23-72; on or before 7-17-72 Wilderness Society file brief; all defendants file briefs on or before 7-31-72; hearing set 8-14-72 and 8-15-72 if necessary; proposed findings to be filed on or before 8-21-72. (N) Hart, J.

June 15—Interrogatories and request of pltfs. for production of documents; attachment; c/m 6-15-72; filed.

June 19—Request of plaintiff to defendants motion for production under Rule 34; c/m 6-16.

June 19—Request of plaintiff to defendant Alyeska Pipeline for production under Rule 34; affidavit; c/m 6-16.

June 19—Transmittal sheet from USCA returning preliminary record.

* *

June 21—Request of Alyeska Pipeline Service Co., for production of documents; c/m 6-21-72.

June 23—Order on Stipulation for protective order. (N) Hart, J.

* *

June 20—Affidavit of Harold A. Berends; filed. Hart, J.

June 20—Affidavit of Theodore G. Bingham; filed. Hart, J.

June 20—Affidavit of Malcolm L. Johnson; filed. Hart, J.

June 20—Affidavit of Stuart W. Gearhart. c/m 6-16-72. Hart, J.

June 26—Answer of plaintiff Environmental Defense fund to interrogatories; affidavit; c/m 6-26.

June 26—Answer of plaintiffs to interrogatories; Exhibits A, B, C & D; c/m 6-26.

June 29—Response of plaintiff to request of Cordova District Fisheries Unions for production; c/m 6-29-72.

June 29—Answer of intervenor State of Alaska to first amended complaint; c/m 6-29-72.

Jul. 3—Response of Alyeska Pipeline Service Company to interrogatories & request for production of documents; c/m 7-3.

Jul. 10—Answer of intervenor plaintiffs David Anderson & Canadian Wildlife Federation to interrogatories by defendant Alyeska Pipeline Company; Exhibit A, B, C & D; c/m 7-10-72.

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Jul. 13—Answer of intervenor plaintiffs Goffrey Warden to interrogatories by defendant Alyeska Pipeline Company; affidavit; c/m 7-13-72.

Jul. 17—Motion of David Anderson and the Canadian Wildlife Federation for a final judgment permanently enjoining the approval by the Secretary of Interior of permits implementing the trans Alaska Pipeline System; P & A's; c/m 7-17. M.C.

Jul. 17—Brief of Intervenor State of Alaska on the Mineral Leasing Act Issues and related issues; c/m 7-17.

Jul. 17—Copy of statement of intervenor State of Alaska on the Cordova District Fisheries Union Motion for partial summary judgment; exhibits 1, 2, 3, 4, 5 & 6; c/m 7-17.

Jul. 17—Memorandum of P & A's by defendants in response to issues raised in plaintiffs motion for partial summary judgment filed May 12, 1972; appendix A & B, c/m 5-12.

Jul. 17—Brief of Alyeska Pipeline Service Company covering Mineral leasing act and terminal facility issues; P/S 7-17.

Jul. 17—Brief on National Environmental Policy Act issues by plaintiff; c/m 7-17.

Jul. 17—Appendix by plaintiff, supplemental documents; Vol. I, II & III.

Jul. 17—Alyeska Supporting Documents; Vol. I, II; attachment; A, B, C, D, E, F; Vol. III & IV.

Jul. 19—Memorandum of Cordova District Fisheries Union, appendix.

Jul. 19—Motion of State of Alaska for leave to file amendment of & supplement to its answer; P & A's; exhibit.

Jul. 19—Motion of Alyeska Pipeline Service Company for clarification of Preliminary injunction; P & A's; affidavit (2) with attachment.

Jul. 21—Affidavit of service.

Jul. 25—Brief of Alyeska Pipeline Service Company.

Jul. 26—Opposition of plaintiff to motion to clarify preliminary injunction; c/m 7-26.

Jul. 28—Motion of defendant Alyeska Pipeline Service Company for clarification of preliminary injunction heard & granted. Hart, J.

Jul. 28—Order granting motion of defendant Alyeska Pipeline Service Company for clarification of preliminary injunction of 4-23-70. (X) (See order for details) (Original filed in C.A. 928-70) Hart, J.

DATE	PROCEEDINGS

1972

Jul. 28—Letter dated 7-28-72 to Judge Hart changing wording of paragraph 2 of brief relating to the State Highway adding page 2 to replace corresponding pages of the agreement as per defendants.

Jul. 31—Deposition of Jack Horton, exhibit A; plaintiffs exhibits A thru E.

Jul. 31—Letter dated 6-16-72 from deponent authorizing corrections to deposition; copies of corrections attached.

Jul. 31—Letter dated 5-23-72 from Mr. Porter to Alderson Reporting Company re: corrections.

Jul. 31—Deposition of David A. Brew; exhibits by plaintiffs 1-6.

Jul. 31—Deposition of Frederick Sancer; exhibits 1, 2, 3, 5, 6 & 7 by plaintiff; defendants exhibit #2.

Jul . 31—Deposition of William Vogely; plaintiffs exhibit 1 & 2.

Jul. 31—Deposition of Jared Carter; exhibits by plaintiff 1, 2 & 3; attachments A thru I.

Jul. 31—Deposition of Richard Nehring; exhibits 1 thru 7 by plaintiff.

Jul. 31—Deposition of Rogers C. B. Morton; exhibits by plaintiff 1 thru 5; exhibits by defendant A, B, C & D.

Jul. 31—Letter dated June 28, 1972, to Alderson Reporting Company; re: corrections.

Jul. 31—Letter dated July 26, 1972 to Alderson Reporting Company with affidavit.

Jul. 31—Letter dated July 28, 1972 to Alderson Reporting Company with attachments.

Jul. 31—Brief of defendants in response to all plaintiffs issues on N.E.P.A. issues; appendix A, B, C, D, E, F, G, H, I & J; c/m 7-31.

Jul. 31—Brief of Alyeska Pipeline Service Company; volumes 1, 2, 3, 4, 5, 6, 7; 7-31.

Jul. 31—Memorandum amicus curiae of United Distribution Companies; appendix A, c/m 7-31.

Jul. 31—Brief of intervenor State of Alaska; exhibit A; c/s 7-31.

Jul. 31—Stipulation that the 42 page document entitled "alternatives to the Trans-Alaska Pipeline System, effects on Fish & Wildlife of four possible routes dated 10-29-71, was submitted on 11-1-71 to Kenneth Roberts; c/m 7-28.

DATE PROCEEDINGS

1972

Aug. 7—Brief of National Environmental Policy Act issues to replace the typewritten briefs filed earlier; c/m 8-7.

Aug. 7—Reply brief of plaintiffs appendices A thru I; c/s 8-7.

Aug. 7—Reply brief for David Anderson & The Wildlife Federation; c/m 8-7.

Aug. 8—Transcript of proceedings 7-28-72; E. A. Kaufman Reporter (Court's copy).

Aug. 10—Reply brief of Cordova Distributor Fisheries Union; c/m 8-8.

Aug. 10—Hearing begun, environmental aspect; respited to August 15, 1972. (Reporter: E. A. Kaufman) Hart, J.

Aug. 15—Hearing resumed, mineral aspect, and concluded. Denying plaintiffs motion for partial summary judgment; denying plaintiffs and intervenors prayers for preliminary and permanent injunction dissolving the injunction and dismissing the complaint. (Reporter: E. A. Kaufman) Hart, J.

Aug. 16—Order denying plaintiffs motion for partial summary judgment; denying plaintiffs and intervenors prayers for preliminary and permanent injunction; dissolving injunction; dismissing the complaint. (N) Hart, J.

Aug. 17—Transcript of proceedings 8-14-72; E. A. Kaufman Reporter (Court's copy).

Aug. 17—Transcript of proceedings 8-15-72; E. A. Kaufman Reporter (Court's copy).

Aug. 22—Notice of appeal by David Anderson & The Wildlife Federation intervenor plaintiffs from order of 8-16-72. Copies mailed to Herbert Pettle, Robert E. Jordan, William E. Allen; deposit $5.00 by Berlin.

Aug. 22—Notice of appeal by The Wildlife Society, Environmental Defense Fund, Inc. & Friends plaintiffs from order of 8-16-72. Copies mailed to Herbert Pettle, Robert E. Jordan, William Allen. Deposit of $5.00 by Flannery.

Aug. 22—Preliminary Record on Appeal delivered to USCA; deposit of $1.25 by Dennis M. Flannery; receipt from USCA for preliminary record.

Aug. 23—Certificate of John J. McHale administrative record of Trans-Alaska Pipeline decision with 9 volumes and Box No. A, 10 & 18. (Filed in C. A. 861-71).

DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C.A. No. 861-71

THE CORDOVA DISTRICT FISHERIES UNION

v.

MORTON, ET AL

DATE	PROCEEDINGS
1971	
Apr. 28	Complaint, appearance Exhibit A; filed.
Apr. 28	Summons, copies (4) and copies (4) of Complaint issued D.A. ser 4-30; #1 ser 5-7; #2 ser 5-10; A.G. ser 5-3.
June 28	Motion of defts. to change venue; memorandum; c/m 6-28-71; M.C.; appearance of Herbert Pittle; filed.
June 29	Answer of defts. to complaint; c/m 6-29-71; appearance of Herbert Pittle; filed.
June 29	Certificate of service of defts. as to exhibits A, B & C on 6-29-71; filed.
June 29	Calendared (N) CD/N.
Jul. 6	Motion of pltf. for enlargement of time to file opposition; P&A; c/m 6-30-71; M.C.; filed.
Jul. 7	Notice of pltf. to take deposition of Bernard Coster; c/m 7-2-71; filed.
Jul. 9	Amended notice of pltf. to take deposition of Bernard Coster; c/m 7-5-71; exhibit A; filed.

Jul. 9—Stipulation extending time to file opposition to motion for change of venue to and including July 19, 1971. (fiat) (N) Hart, J.

Jul. 19—Opposition of pltf. to motion to change venue; exhibits 1 thru 4; c/m 7-15; filed.

Jul. 27—Request of pltf. for production under Rule 34; c/m 7-27-71; filed.

Jul. 27—Response of defts. to pltf.'s opposition to motion to change venue; attachment; c/m 7-27; filed.

Aug. 3—Withdrawal of motion to change venue by Defts.; filed.

Aug. 16—Motion of pltf. for partial summary judgment; memorandum; exhibits A & B; c/m 8-16-71; M.C.; filed.

Aug. 20—Motion of Alyeska Pipeline Service Company to intervene as a deft.; attachment 1; P&A; Appendix A&B; exhibit; c/m April 20, 1971; appearance of Robert E. Jordan III; deposit $5.00 by Jordan; filed.

Aug. 23—Notice by pltf. of taking of deposition of William R. Hudson; exhibit A; c/m 8-19; filed.

Aug. 27—Memorandum of pltf. in opposition to motion of Alyeska Pipeline Service Co. to intervene as deft; c/m 8-27; filed.

Aug. 27—Response of defts. to pltf's request for production; c/m 8-27-71; filed.

Aug. 27—Motion of defts. to place pltf's motion for partial summary judgment in abeyance; memorandum, attachment 1; c/m 8-27-71; M.C.; filed.

DATE	PROCEEDINGS
1971	
Aug. 30	Motion of the State of Alaska to intervene as deft.; P&A; affidavit; c/m 8-30-71; M.C.; appearance of John E. Havelock (State Capitol Pouch K, Juneau, Alaska); filed.
Sep. 7	Memorandum of pltf. in response to motion by State of Alaska to intervene; c/m 9-7; filed.

Sep. 8—Appearance of William H. Allen and Richard D. Copaken as counsel for State of Alaska, intervenor; CD/N; filed.

Sep. 10—Opposition of pltff. to motion to place pltffs. motion for partial summary judgment in obeyance; c/m 9-10-71; filed.

Sep. 10—Order granting motion of State of Alaska to intervene as a deft. on condition that Alaska file pleading no later than 9-30-71. (N) Hart, J.

Sep. 20—Order granting Alyeska Pipeline Service Co.'s motion to intervene; for production of documents. (N) Jones, J.

Sep. 23—Re-notice by pltf. of taking deposition of William R. Hudson; c/m 9-21-71; filed.

Sep. 27—Affidavit of service on re-notice of deposition; filed.

Sep. 28—Interrogatories of pltf. to deft. #1; filed.

Sep. 28—Affidavit of service by Kathleen M. Peterson of interrogatories to Rogers C. B. Morton; filed.

Sep. 30—Deposition of Bernard Coster for the pltf.; filed.

Sep. 30—Deposition of Bernard Coster for the pltf.; Deft's exhibits A, B, C, D, F, G, I; filed.

Sep. 30—Affidavit of Rosemary Rice in re to disposition of Bernard Coster; filed.

Sep. 30—Answer of intervenor State of Alaska to the complaint; c/m 9-30; filed.

Oct. 14—Points & Authorities by pltf. in support of opposition to motion to hold pltf's motion for summary judgment in abeyance; exhibit A; c/m 10-13; filed.

Oct. 14—Memorandum of Alyeska Pipeline in support of deft's motion to place pltf's motion in abeyance; c/m 10-14-71; filed.

Oct. 15—Statement of intervenor State of Alaska on deft's motion that pltf's motion for partial summary judgment be placed in abeyance; c/m 10-15; filed.

DATE PROCEEDINGS

1971

Oct. 15—Motion of defts' to place pltf's motion for partial summary judgment in abeyance argued and granted. (Order to be presented) (Rep: E. A. Kaufman) Hart, J.

Oct. 19—Transcript of proceedings, October 15, 1971, pages 1-9; reporter: E. Alfred Kaufman, Court's copy; filed.

Oct. 19—Answer of defts. to pltf's interrogatories; c/m 10-19-71; filed.

Oct. 19—Order granting defts' motion to hold pltf's motion for partial summary judgment in abeyance until further order. (N) Hart, J.

Oct. 29—Exhibits from R.&R. court reporters; filed.

Nov. 4—Deposition of Commander William R. Hudson for the pltf.; filed.

Nov. 11—Notice by pltf. to take deposition of Frederick J. Sanger; c/s 11-11; filed.

Nov. 17—Motion of defts. for protective order enlarging time for taking deposition; P&A; exhibit; c/m 11-17-71; M.C.; filed.

Nov. 19—Order directing that deposition of Dr. Sanger not be taken on 11-19-71 and not until after he has completed his work on NEPA impact statement, counsel for deft. shall then notify pltfs. for said deposition. (N) Hart, J.

Nov. 26—Request by pltf. for production; c/m 11-23; filed.

Dec. 14—Request of pltf. for production under Rule 34; c/m 12-14-71; filed.

1972

Jan. 5—Response of defts. to request for production; c/m 1-5; filed.

Jan. 18—Response of defts. to request for production of documents; c/m 1-17-72; filed.

Feb. 29—Interrogatories of pltf. to Alyeska Pipeline Service Co.; c/m 2-28-72; filed.

Feb. 29—Request of pltf. for production; c/m 2-28-72; filed.
Mar. 30—Response by defts. to pltf's request for production; c/m 3-28; filed.
Apr. 21—Request by pltf. for production; c/m 4-12; filed.
Apr. 25—Response of Alyeska Pipeline Service to interrogatories; attachments; I & II; c/m 4-25-72; filed.
Apr. 28—Motion of Alyeska Pipeline Service to Consolidate with 928-70; p&a; c/m 4-28-72; M.C.
May 12—Notice of pltf. to take depositions of Knute Johnson, Ross Mullins, Chet Cheshier, Pete Lovseth, Pete Isleib, Ed King, Bah Blake and Charlie Simpler; c/m 5-12-72.

DATE	PROCEEDINGS

1972
May 12—Request of pltf. for production under Rule 34 to State of Alaska; c/m 5-12-72.
May 12—Notice of defts. of intention to issue permits; c/m 5-11-72; filed.
May 11—Order granting motion of Alyeska Pipeline Service Company to consolidate C.A. 861-71 and C.A. 928-70. (N) Hart, J.
May 17—Copy of motions of deft. Alyeska Pipeline Service Company to place pltf's motion for partial summary judgment in abeyance; table of authorities; memo and for scheduling of pretrial conferences and related procedures; P&A; table of contents; c/m 5-17-72; M.C. (original filed in CA 928-70.)
May 19—Motion of deft. to withhold consideration of motion for partial summary judgment by Wilderness Society; c/s 5-19; M.C. (filed in CA 928-70)
May 19—Motion of defts. for scheduling of pretrial conferences; P&A; c/s 5-19; M.C. (filed in CA 928-70)
May 19—Copy of memo. of intervenor, State of Alaska, in response to motion of Alyeska Pipeline to pltf's motion for partial summary judgment in abeyance; c/m 5-19 (original filed in CA 928-71).

May 19—Copy of memo. of intervenor, State of Alaska, in response to motion of Alyeska Pipeline for scheduling of pretrial conference; c/m 5-19.
May 23—Transcript of proceedings, May 19, 1972, pages 1-9; rep: E. A. Kaufman (filed in CA 928-70).
May 26—Interrogatories by Alyeska Pipeline Service to Wilderness Society; c/s 5-26 (filed in CA 928-70).
June 6—Notice by pltf. of taking deposition of witnesses; c/m 6-6.
June 6—Notice by pltf. of taking deposition of persons conducting water tests; c/m 6-6.
June 6—Notice by pltf. of taking deposition of James Hemming; c/m 6-6.
June 6—Notice by pltf. of taking deposition of Gordon Watson and Leroy Sawl; c/m 6-6.
June 5—Deposition of Steven R. Smith for the pltfs.
June 5—Deposition of Edwin L. "Chet" Chaser for the pltfs.
June 5—Deposition of Malcolm S. Isleid for the pltfs.
June 5—Deposition of James E. King for the pltfs.

DATE	PROCEEDINGS

1972
June 5—Deposition of Ross Mullens for the pltfs.; Exhs. 1 & 2.
June 5—Deposition of Knute Johnson for the pltfs. with attached map.
June 7—Motion of defts. for protective order; P&A; c/m 6-7 (original filed in CA 928-71).
June 9—Transcript of proceedings June 7, 1972 pages 1 thru 50; Reporter; Joan Curtis Blair (filed in CA 928-70).
June 9—Interrogatories by deft. Alyeska Pipeline to intervenor pltfs.; c/s 6-9-72; filed in CA 928-70).
June 13—Petition of United Distribution Companies for leave to participate amicus curiae and withdrawal of petition to intervene; c/s 6-13; M.C. (filed in CA 928-70).

June 14—Order directing all parties serve any additional requests for production on or before 6-16-72; on or before 6-19-72 Government make available to all parties certain documents; discovery be completed on or before 6-23-72; on or before 7-17-72 Wilderness Society file brief; all defts. file briefs on or before 7-31-72; hearing set 8-14-72 and 8-15-72 if necessary; proposed finds to be filed on or before 8-21-72. (N) Hart, J.

June 19—Request by pltfs. for production to deft. Rogers C. B. Morton; c/m 6-16 (filed in CA 928-70).

June 19—Request by pltfs. for production of Alyeska Pipeline Service; c/m 6-16 (filed in CA 928-70).

June 20—Affidavit of Harold A. Berends.

June 20—Affidavit of Theodore G. Bingham.

June 20—Affidavit of Malcolm L. Johnson.

June 20—Affidavit of Stuart W. Gearhart; c/m 6-16-72.

June 21—Request of intervenor deft. for request for production; c/m 6/21/72.

June 23—Order on stipulation for protective order. (N) Hart, J.

June 29—Response of deft. to request for production of documents (filed in CA 928-70).

June 29—Answer of intervenor, State of Alaska, to first amended complt.; c/m 6-29.

Jul. 3—Response of Alyeska Pipeline Service Co. to interrogatories and request for production of documents (dated 6-14-72); c/m 7/3/72.

Jul. 6—Deposition of Wallace H. Noerenberg w/pltf's exhs. 1 & 2, published.

DATE PROCEEDINGS

Jul. 6—Deposition of Ben L. Hilliker with pltf's Exhs. # 1 & 2, published.

Jul. 6—Deposition of Joseph R. Blum with pltf's exhs. 1, 2, 3, 4, 5, 6 & 7, and State's exh. #1, published.

Jul. 10—Copy of answer of intervenor-pltfs. David Anderson and Canadian Wildlife Federation to interrogatories by deft.; c/m 6-10; original filed in CA 928-70.

Jul. 13—Copy of answer of intervenor-pltf. Warden to interrogatories of Alyeska Pipeline Co.; aff.; c/m 7-13; original filed in CA 928-70.

Jul. 17—Response of defts. to issues raised in pltf's motion for partial summary judgment; appendix A & B; c/m 7-17.

Jul. 17—Copy of brief for intervenor State of Alaska on Mineral Leasing Act issues and statement on Cordova motion for partial summary judgment; c/s 7-17.

Jul. 19—Memorandum of Cordova District Fisheries Union; appendix filed in CA 928-70.

Jul. 19—Motion of intervenor State of Alaska for leave to file amendment to its answer to complt.; P&A; M.C.

Jul. 19—Copy of motion to Alyeska Pipeline Service for clarification of preliminary injunction; P&A; affs. (2); c/m 7-19 (original filed in CA 928-70)

Jul. 21—Affidavit of service filed in CA 928-71.

Jul. 25—Brief of Alyeska Pipeline Service Co. covering Mineral Leasing Act; c/s 7-17; filed in CA 928-70.

Jul. 28—Letter dated 7/28/72 to Judge Hart changing wording of paragraph 2 of brief relating to the State Highway adding page 2 to replace corresponding page of the agreement as per defts.

Jul. 28—Motion of deft. Alyeska Pipeline Service Co. for clarification of preliminary injunction heard and granted. (Rep: Al Kaufman) Hart, J.

Jul. 28—Order granting motion of deft. Alyeska Pipeline Service Co. for clarification of preliminary injunction of 4-23-70. (N) (See order for details) (original filed in CA 928-70). Hart, J.

Jul. 31—Stipulation in re 42 page document entitled alternative to the trans-Alaska Pipeline System dated October 29, 1971 was submitted November 1, 1971; c/m 7-28.

DATE PROCEEDINGS

1972

Jul. 31—Brief of deft. in response to pltfs' briefs on Nepa issues (filed in C.A. 928-70).

Jul. 31—Brief of Intervenor State of Alaska; c/m 7-31.

Aug. 7—Brief of National Environmental Policy Act issued to replace the briefs filed earlier. (filed in CA 928-60); c/m 8-7.

Aug. 8—Transcript of proceedings, pages 1-12; July 28, 1972; rep: E. Alfred Kaufman. (filed in CA 928-70)

Aug. 10—Reply brief of Cordova District Fisheries Union; c/m 8-8 (filed in CA 928-70).

Aug. 14—Hearing begun; environmental aspect; respited to Aug. 15, 1972. (Rep: E. A. Kaufman) Hart, J.

Aug. 15—Hearing resumed, mineral aspect, and concluded; denying pltfs' motion for partial summary judgment; denying pltfs' and intervenors prayers for preliminary and permanent injunction dissolving the injunction and dismissing the complts. (Rep: E. A. Kaufman) Hart, J.

Aug. 16—Order denying pltfs' motion for partial summary judgment; denying pltfs' and intervenors prayers for preliminary and permanent injunction; dismissing the complts. (N) Hart, J.

Aug. 22—Notice of appeal by pltf. from order of 8-16-72; copies to Herbert Pittle, Robert E. Jordan and William Allen; $5.00 by Hogan.

Aug. 22—Preliminary record on Appeal delivered to USCA; deposit by Thomas F. Hogan $1.25.

Aug. 22—Receipt from USCA for preliminary record.

Aug. 23—Certificate of John J. McHale, Administrative record of Trans-Alaska Pipeline decision with 9 volumes and Box No. A, 10 and 18.

Letter from Kenneth P. Fountain to Russell E. Train, June 10, 1969

TRANS ALASKA PIPELINE SYSTEM,
Houston, Tex., June 10, 1969.

Re right-of-way application and sale of gravel.
Hon. RUSSELL E. TRAIN,
Under Secretary, Department of the Interior,
Interior Building,
Washington, D.C.

DEAR MR. SECRETARY: The attached application for Pipeline Right-of-Way has been delivered to the Office of the State Director, BLM, in Anchorage, Alaska. We have requested guidance from that office on the proper procedure for the processing of the application. The application deviates from requirements of the regulations with respect to 2234.1-2(d)(1) *Maps* and 2234.5-1(e) *Pumping plant site.*

In each case, detailed survey data is not yet available to facilitate mapping within the accuracy and with the requisite bearings, distances, and ties as set out in the cited sections. As stated in the application, a survey which will produce the mapping and station plats in exact compliance with the regulations has been contracted for and work is currently under way. We expect to produce an alignment map and station plats duly certificated by November, 1969. We plan to furnish the proper station plats and alignment map sheets as they are produced. The first of these alignment sheets should be available in late July or August. It is planned to furnish prints only of these sheets since some minor changes would be expected when the route is actually staked on the ground. When each of the sheets has been on the ground verified we will furnish reproducibles as required. Linen can be furnished, as specified in the regulations, however, film, if acceptable, will provide a better document since the base map will be aerial photography.

The interim alignment map furnished is completely plotted to a 1 inch = 1 mile scale. It contains, in addition to the pipeline plot, gravel and rock locations, soil test bore hole locations, a center line plot of the construction road right-of-way requested and notations where above ground construction is expected. Recognizing that soils data and drilling logs are not ordinarily part of a right-of-way application, this data is included both for your information and use and to demonstrate the depth of research employed in selection of the route sought.

The aditional right-of-way both for the construction road and the additional 46' which are necessary for ingress and egress to the primary right-of-way have been applied for under the provisions of 43 CFR 2234.1-3(a)(3). In reviewing 43 CFR, this provision appeared to be the most appropriate.

There is one additional right-of-way matter. We will be constructing communication facilities along the general route of the pipeline. These will most probably be microwave installations and will require sites for reporter station towers. Location of these sites will be accomplished in the near future and applications will be forthcoming.

There are, of course, large requirements for gravel incident to the construction. Sources of gravel have been tentatively located along the pipeline route and estimates of quantities required have been prepared. (See attached schedule of gravel sources and locations). As you can appreciate we have not proved each of these sources to insure that it is readily useable. We have defined with some degree of accuracy what our quantity requirements are. We would prefer to purchase the total amount of gravel without being held to the amounts specified from each specific source, i.e., so long as the total was not exceeded the amount from any single source could be more or less than that set out in the attached schedule. It would also be preferred if the time allowed to dig and take the gravel could extend up to say five or six years.

Time is of the essence in obtaining right-of-way for this pipeline. The unique environment of Alaska combined with the remoteness of the route make necessary a concurrence of processes that would otherwise be sequential. To give you an appreciation of our time requirements, I am enclosing:

1. *Road Construction Schedule.*—The first three spreads are scheduled to begin work this summer, spread one in August and spreads two and three in September. Gravel and right-of-way must be firmed up by July.

2. *Pipeline Construction Schedule.*—Although actual work is not scheduled to begin until early 1970, approximately six months mobilization time is required and we must have right-of-way data even before we request bids. Thus it is imperative that we obtain right-of-way permits with conditions and stipulations by July.

Also enclosed is a short summary of our method of route selection and a brief description of the construction road together with a tabulation of soil data, Valdez to Fairbanks.

It should be noted that the portions of above ground construction on the requested route are quite limited (approximately 40 miles or 5% of the total mileage) and more importantly in relatively short segments. This should relieve many of the fears expressed about the adverse effects of substantial surface construction.

If you have any questions or need any additional data, pleast let us know.

Very truly yours,

KENNETH P. FOUNTAIN

GRAVEL REQUIREMENTS FOR ROADS AND STATIONS

Location of borrow pit		Alinement sheet reference	Cubic yards
Range	Township		
R-14-E	T-8-N	1	420,000
R-14-E	T-7-N	1	230,000
R-14-E	T-6-N	1-2	440,000
R-14-E	T-5-N	2	200,000
R-14-E	T-4-N	2	426,000
R-14-E	T-3-N	2	240,000
R-15-E	T-2-N	2	429,000
R-15-E	T-1-N	2	200,000
R-14-E	T-1-N	3	214,000
R-14-E	T-1-S	3	220,000
R-14-E	T-2-S	3	423,000
R-14-E	T-3-S	3	210,000
R-14-E	T-4-S	3	300,000
R-14-E	T-5-S	3-4	508,000
R-14-E	T-6-S	4	409,000
R-14-E	T-7-S	4	205,000
R-14-E	T-8-S	4	403,000
R-14-E	T-9-S	4	198,000
R-13-E	T-9-S	4-5	210,000
R-13-E	T-10-S	5	344,000
R-13-E	T-11-S	5	290,000
R-12-E	T-12-S	5	444,000
R-12-E	T-13-S	5	296,000
R-12-E	T-14-S	6	160,000
R-12-E	T-15-S	6	268,000
R-11-E	T-16-S	6	300,000
R-10-W	T-37-N	6	148,000
R-10-W	T-36-N	6	148,000
R-10-W	T-35-N	6-7	296,000
R-10-W	T-34-N	7	162,000
R-10-W	T-33-N	7	308,000
R-10-W	T-32-N	7	298,000
R-10-W	T-31-N	7	150,000
R-11-W	T-31-N	7	140,000
R-11-W	T-30-N	8	148,000
R-12-W	T-29-N	8	368,000
R-12-W	T-27-N	8	363,000
R-12-W	T-26-N	8	125,000

R-13-W	T-26-N	8	120,000
R-13-W	T-26-N	9	150,000
R-13-W	T-25-N	9	148,000
R-13-W	T-24-N	9	128,000
R-14-W	T-24-N	9	162,000
R-14-W	T-23-N	9	527,000
R-15-W	T-20-N	10	333,000
R-15-W	T-20-N	10	120,000
Total yardage for roads			12,329,000

STATIONS

R-14-E	T-1-N	3	250,000
R-14-E	T-7-S	4	250,000
R-12-E	T-12-S	5	250,000
R-15-W	T-22-N	9	250,000
Grand total			13,329,000

I. PIPELINE ROUTE

The preliminary pipeline route selection was done by a task force of 27 men during the months of August and September 1968. There were five helicopter transported field parties involved in gathering data on several possible routes. From the evaluation of this data, a tentative route, with alternates, was chosen.

During the months of March and April of 1969, five more field parties were engaged in gathering soil data and samples along the tentative routes. These parties were comprised of a Party Chief, a Geologist, a three-man drilling crew and the necessary cat train personnel. The parties were supported by fixed wing aircraft and helicopters. The data collected included ground and air temperatures, geological observations, and drill hole logs and samples.

A ditching testing program was conducted in the Fairbanks area. This program was to determine the most feasible method and type of equipment to excavate different types of frozen soils. These test results will be made avail-

able to enable contractors to use optimum ditching methods with minimum damage to ground surface.

With the assistance of R&M Engr.-Geological Consultants, Arctic Engineering Consultants, and the University of Alaska, we have evaluated the data acquired from soil borings, from soil temperature readings, and from aerial photo interpretations. In addition, the entire route will be photographed using conventional color film and infrared film. Results of these new photos will be studied in detail to confirm the route being applied for.

The route as now proposed is a result of all of these studies in addition to the normal pipeline studies of hydraulic gradients, etc. This route is now thought to be the most economical and the most secure from damage to the pipeline and to the terrain. The route will of course be subject to minor alterations as we continue our studies with low altitude aerial photos and ground surveys.

II. Right-of-Way Width

The 54' R.O.W. width which is allowed by statute is not adequate for the construction of a 48" pipeline. The R.O.W. should be 100' width to accommodate the extremely large equipment that is necessary to handle the 48" pipe, and the large spoil pile of excavated soil. Attached are sketches of the required 100' wide pipeline R.O.W., and the 100' wide road R.O.W., for different methods of construction.

III. Road Construction

It will be necessary to construct approximately 390 miles of roadways to furnish access to the pipeline during construction. This road will begin at the Manley Hot Springs-Livengood Road at a point approximately 10 miles west of Livengood, and will continue generally north along the pipeline R.O.W. to Prudhoe. This road would be considered to be at least a semi-permanent, all weather road. The total traffic on this road will exceed 240,000 tons of freight during the construction of the pipeline.

The route for the road has been selected to follow the pipeline as nearly as possible. The road deviates from the pipeline R.O.W. in some areas, due primarily to the fact that a pipeline can negotiate much steeper grades than are practical for a road. Other factors taken into account were locations of stable soils, gravel borrow areas, rock quarry areas, and drainage features.

The road R.O.W. width should be 100 ft. to allow room for normal road construction methods for this type of terrain. The road would utilize normally accepted types of drainage structures, including culverts, bridges and fords.

There are numerous special studies in progress to determine the best methods of handling the Ecological, Archaeological and Conservation problems that will be encountered during and after the construction of the pipeline and road. Results of these studies will establish procedures to be used to meet all requirements of minimum changes to the terrain.

Valdez to Fairbanks Initial Summary Soil Types
[In miles]

Soil classifications	Frozen	Occasionally Frozen	Not frozen	Total
Silt	8.5			8.5
Sand	2.1			2.1
Silt—sand	26.0			26.0
Colluvium silt	2.4			2.4
Colluvium		3.9	0.5	4.4
Moraine		8.1	6.9	15.0
Alluvial fan			10.7	10.7
Glacial till		3.5	6.1	9.6
Silt—clay		15.3		15.3
Silt—clay and granular soil	42.3			42.3
Gravel	2.6		50.7	53.3
Sand—gravel and cobbles			.9	.9
Terrace gravel			.6	.6
Silt over gravel	11.2		7.0	18.2
Silt—sand over gravel		31.9	4.3	36.2
Silt—clay over gravel			.8	.8

Soil classifications	Frozen	Occasionally Frozen	Not frozen	Total
Silt over sand/gravel	8.5			8.5
Colluvium over glacial till		7.6		7.6
Silt over bedrock	.8		19.5	20.3
Silt—sand and cobbles over bedrock	3.4			3.4
Silt—sand over bedrock			11.5	11.5
Glacial till over bedrock			12.3	12.3
Moraine and tile over bedrock			7.0	7.0
Silt—sand/gravel over bedrock			1.8	1.8
Bedrock			16.4	16.4
Bedrock (greenstone)			.9	.9
Talus			2.8	2.8
Tailings			.4	.4
Snowslide zone			2.7	2.7
No coverage			7.2	7.2
Total miles	107.8	70.2	171.0	349.1

STIPULATIONS FOR THE TRANS ALASKA PIPELINE SYSTEM

Environmental Stipulations to be used in conjunction with existing laws and regulations for construction of the 48" oil Pipeline and related facilities from Prudhoe Bay to Valdez, Alaska.

Prepared by:

DEPARTMENT OF THE INTERIOR
and the
FEDERAL TASK FORCE ON ALASKAN OIL DEVELOPMENT

(Seal)

September 1969

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington, D.C. 20240

Letter of Acknowledgement

This volume of stipulations represents the concerted efforts of the Department of the Interior and the Federal Task Force on Alaskan Oil Development, with the participation of State of Alaska agencies, to draw up guidelines that will provide exacting environmental protection during the construction and operation of the Trans Alaska Pipeline.

In this endeavor, we have asked our bureaus and representatives to judge both the conceptual framework and individual stipulations by a yardstick that was both fair and firm, one that stressed equally the importance of environmental protection and resource development.

The participation in this project has been notably broader than the cooperative effort of the Government agencies formally involved. We have received substantial counsel

from conservation and industry representatives, as well as from the interested public.

This wide participation and interest, as well as the depth of many contributions, underscore what is becoming a national commitment toward the proper use and protection of our natural resources.

It is a pleasure to acknowledge and thank those who have participated directly in this project, and particularly those not professionally involved who have contributed their sincerity and advice toward the responsible development of arctic Alaska.

/s/ WALTER J. HICKEL
Walter J. Hickel
Secretary of the Interior

A. Definitions

As used herein, the following terms have the following meanings:

"Authorized Officer" means the Alaska State Director, Bureau of Land Management, or the person designated or delegated to act in his stead with respect to the subject matter of this permit. As used herein, it is synonymous with "Superintendent in Charge," as that terms is used in 43 CFR, Subpart 2234.

"Pipeline" means the Pipeline right-of-way; all or any part of the Pipeline system constructed thereon; and all structures, facilities, and appurtenances related thereto or used in connection therewith, whether located on or off the Pipeline right-of-way.

"Permittee" means each and every individual, person or company, including partnerships, corporations, joint ventures, associations, or any other business firms engaged in, or which shall become engaged in, the construction, operation or maintenance of the Pipeline, together with their employees, agents, contractors and subcontractors and the employees of each of them.

B. General

1. Acknowledgments of Permittee

Permittee, by accepting this permit and commencing activities pursuant thereto, acknowledges each of the following:

a. That, except where the approval of the Authorized Officer is required before Permittee may commence a particular operation, neither the United States nor any of its agents or employees agrees to or is in any way obligated to examine or review any plan, design, specification, or other document which may be filed by Permittee with the Authorized Officer pursuant hereto;

b. That the absence of any comment by the Authorized Officer or any other employee of the United States with respect to any plan, design, specification, or other document which may be filed by Permittee with the Authorized Officer does not represent in any way whatever any assent to, approval of, or concurrence in such plan, design, specification, or other document or of any action proposed therein;

c. That this permit, and the rights and privileges granted thereby, is subject to all valid existing rights in and to the land which is the subject of this permit, and that the United States makes no representations or warranties whatever, either express or implied, as to the existence, number, or nature of such valid existing rights.

2. Authorized Officer

The Authorized Officer, and such representatives of interested Federal agencies as he may designate, may inspect the exploration, construction, operation, or any other activities of Permittee at any time.

For purposes of information and review, the Authorized Officer at any time may call upon Permittee to furnish any or all data related to pre-construction, construction, or operation activities undertaken in connection with the Pipe-

line and its related facilties, including roads. Permittee shall furnish the requested data as promptly as possible, or as otherwise required under the terms of this permit or other applicable permits. Such data specifically include, but are not limited to, records of all geological data, soil core drillings and terrain temperature measurements made during pre-construction investigations; and engineering standards, basic data and technical criteria relating to the design, construction and operation of the Pipeline, pumping stations, safety devices and monitoring programs.

The Authorized Officer may require Permittee to make such modification of the alignment and installation of the Pipeline as he may deem necessary to protect stability of geologic materials, integrity of the Pipeline, fish and wildlife habitats, and the environment. He may also require Permittee to make adjustments of the above-ground heights and/or methods of installation of the Pipeline to prevent obstruction of access.

The Authorized Officer shall be afforded reasonable use of Permittee's communications systems.

In the event the Authorized Officer determines in his absolute discretion that Permittee has failed or refused to comply with the provisions of this permit, or any other permit issued in connection with the Pipeline, the Authorized Officer, by written order, may suspend or terminate any or all of Permittee's activities. Permittee shall not resume such suspended or terminated activities until given written authorization to do so by the Authorized Officer.

All decisions, orders and determinations of the Authorized Officer, unless otherwise indicated by him in writing, shall be appealable only to the Secretary of the Interior. During the pendency of any such appeal, the Authorized Officer's decision, order, or determination shall not be suspended, but shall remain in full force and effect until the Secretary of the Interior finally disposes of the appeal.

3. Changes in Conditions

Unforeseen conditions arising during construction and operation of the Pipeline may make it necessary to revise or amend these stipulations. In that event, Permittee and the Authorized Officer shall agree as to what revisions or amendments shall be made. If they are unable to agree, the Secretary of the Interior shall have final authority to determine the matter.

4. Equal Opportunity

By accepting this permit, Permittee agrees that, during the period of construction of the Pipeline and its related facilities and roads, and for so long as the Pipeline, or any portion thereof, shall be in operation, or for so long as this permit shall be in effect, whichever is the longest;

a. Permittee will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. Permittee will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Permittee agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Authorized Officer setting forth the provisions of this equal opportunity clause.

b. Permittee will, in all solicitations or advertisements for employees placed by or on behalf of Permittee, state that all qualified applicants will receive consideration for employment without regard to race, religion, sex, color, or national origin.

c. Permittee will send to each labor union or representative of workers with which Permittee has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Authorized Officer, advising the labor union or workers' representative of Permittee's commitments under this equal opportunity clause and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

d. Permittee will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and the rules, regulations, and relevant orders of the Secretary of Labor.

e. Permittee will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended, and by the rules, regulations, and orders of the Secretary of Labor, issued pursuant thereto, and will permit access to Permittee's books, records, and accounts by the Authorized Officer and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

f. In the event of Permittee's noncompliance with the equal opportunity clause of this permit or with any of such rules, regulations, or orders, this permit may be cancelled, terminated or suspended in whole or in part and Permittee may be declared ineligible for further Federal Government contracts or permits in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, as amended, and such other sanctions may be imposed and remedies involved as provided in Executive Order No. 11246 of September 24, 1965, as amended, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

g. Permittee will include the provisions of paragraph a. through g. of this equal opportunity clause in every contract, subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor

issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, as amended, so that such provisions will be binding upon each contractor, subcontractor or vendor. Permittee will take such action with respect to any contract, subcontract or purchase order as the Authorized Officer may direct as a means of enforcing such provisions including sanctions for noncompliance: provided, however, that in the event Permittee becomes involved in, or is threatened with, litigation with a contractor, subcontractor or vendor as a result of such direction by the Authorized Officer, Permittee may request the United States to enter into such litigation to protect the interests of the United States.

5. Liabilities and Responsibilities of Permittee

a. Any structure, property or land harmed or damaged by or during the construction, operation or maintenance of the Pipeline shall be reconstructed, repaired, rehabilitated and restored, as may be necessary, by Permittee as soon as practicable, so that the condition thereof, in the judgment of the Authorized Officer, is at least equal to the conditions thereof immediately prior to such damage or destruction. Permittee further shall abate as soon as practicable any condition existing with respect to the Pipeline or its related facilities or roads, or with respect to the construction, operation or maintenance thereof, which may be causing harm or damage to any person, structure, property, land, stream or wildlife.

b. Permittee shall be liable to the United States for any damage suffered or cost or expense incurred by the United States in any way arising from or connected with any operation under this permit whenever such damage, cost or expenses results from any breach of the permit or from any wrongful or negligent act of Permittee. Immediately upon written notice by the Authorized Officer of the nature and amount of such damage to or cost or expense of the United States, Permittee shall reimburse the United States therefor.

c. Permittee further shall indemnify and hold harmmless the United States against and from any and all demands, claims or liabilities of every nature whatsoever, arising directly or indirectly from or in any way connected with any or all of the following: 1) The construction, operation or maintenance of the Pipeline or of any facility, structure or road used in connection therewith, whether or not located on Federally-owned land; and 2) The use or occupancy, whether authorized or not, by any person whomsoever of any land owned by the United States which is the subject of any permit or right granted to Permittee; provided, however, that the provisions of this paragraph c. shall not be deemed to apply to injuries or damages to the extent caused by employees of the United States acting within the scope of their authority.

6. Bonding Requirements

Permittee shall furnish a bond or other security (hereinafter called "Bond") of such type and on such terms and conditions as are acceptable to the authorized Officer, in the principal amount of five million dollars ($5,000,000), within thirty (30) days after issuance to Permittee of a permit for a right-of-way for oil pipeline purposes.

Said Bond shall have the purpose of: 1) ensuring the performance by Permittee of each and every obligation of Permittee under the terms and conditions of any permit issued to Permittee by the United States in connection with the Pipeline; and 2) providing for immediate payment to the United States of any cost or obligation incurred by the United States in performing any said obligation of Permittee which, in the absolute judgment of the Authorized Officer, Permittee has not performed satisfactorily.

Said Bond shall be maintained in force and effect during construction of the Pipeline, as for so long as the Pipeline is operated, and for so long thereafter as may be necessary.

7. Housing and Quarters

Permittee shall furnish, on a reimbursable basis, such representatives of the United States as may be designated by the Authorized Officer with meals, living quarters and office space during the periods of construction and operational activities. Permittee shall be notified in writing by the Authorized Officer at a reasonable time before need exists, regarding the number of individuals for whom such services and facilities will be required.

8. Public Improvements

Existing telephone, telegraph, and transmission lines, fences, ditches, roads, trails, and other improvements shall be protected in all phases of Permittee's construction operations under this permit. Damage to utilities and improvements shall be promptly repaired to a condition which is at least as good as the condition just prior to such damage.

All roads and trails needed for fire protection shall be kept free of logs, slash, and debris.

Construction activities will not be allowed within one-half (½) mile of all designated recreation sites (campgrounds, waysides, parks) unless authorized in writing by the Authorized Officer.

9. Federal, State and Local Laws and Regulations

Permittee shall comply with all applicable federal, state and local laws and regulations thereunder, existing or hereafter enacted or promulgated, affecting in any manner construction, operation, or maintenance of the Pipeline or any road constructed in connection therewith.

10. Pipeline Standards, Design and Compliance

All design, materials, and construction practices employed in the installation of the Pipeline shall be in accordance with safe and proven engineering practice for the arctic environment and in accordance with the following pipeline standards:

a. U.S.A. Standard Code for Pressure Piping, Liquid Petroleum Transportation Piping Systems (USAS B31.4-1966).

b. The Department of Transportation's proposed regulations on "Transportation of Hazardous Materials by Pipeline."

If either of said pipeline standards contains a provision which is inconsistent with a provision in the other standard, whichever provision is the more stringent shall be observed by Permittee. The plan and profile for the Pipeline shall be submitted for review and approval of the Authorized Officer prior to commencement of construction for any section of the Pipeline. The plan shall show the locations of pumping plant sites, block valves, stream crossings and other facilities; it shall also show those parts of the Pipeline to be constructed above ground, the dimensions of aboveground structures, and the general specifications and locations of all crossings across the Pipeline.

The design shall provide for automatic shut-off valves at each pumping station and additional valves using the best engineering judgment with due regard for the following:

terrain traversed, including associated drainage;

population centers;

wildfowl habitat and fishery habitat;

public water supplies and signinficant water bodies including the Yukon River and other major rivers; and

hazardous geologic areas;

All practical means will be utilized to avoid breaking or otherwise injuring the tundra or other organic layers in permafrost areas outside the Pipeline ditch area.

X-ray testing of weld quality and pressure testing of the completed Pipeline shall be conducted by Permittee prior to placing the system in operation.

During the construction of the Pipeline, Permittee shall protect the environment, stability of geologic materials, and integrity of the Pipeline and shall prevent undue interference with access over or across the Pipeline.

Permittee shall provide for continuous and suitable inspection of the Pipeline and related facilities by qualified inspectors to assure compliance with design and construction specifications.

11. Survey Monuments

In surveyed areas, Permittee shall mark and protect all survey monuments within or near the Pipeline right-of-way against destruction, obliteration or damage during the life of this permit. If any monuments corners or accessories are destroyed, obliterated or damaged, Permittee shall hire a registered land surveyor to reestablish or restore at the same location the monuments, corners or accessories using surveying procedures in accordance with the "Manual of Instructions for the Survey of Public Lands of the United States, 1947 Ed.," and shall record such survey in the appropriate records. Additional requirements for the protection of monuments, corners, and bearing trees may be prescribed by the Authorized Officer.

12. Environmental Briefing

Prior to and during construction activities, Permittee shall provide for environmental and other pertinent briefings of construction and other personnel by such Federal employees as may be designated by the Authorized Officer. Such briefings shall include fire prevention and suppression training for all construction personnel. Permittee shall arrange the time, place and attendance for such briefings upon request by the Authorized Officer. Permitteee shall bear all costs of such briefings other than salary, per diem, subsistence, and travel costs of Federal employees.

In addition, Permittee shall separately arrange with the State of Alaska for such similar briefings as the State may desire.

13. Construction Schedule

Prior to commencement of construction, Permittee shall submit a schedule of its construction activities. This schedule shall be in such detail as may be required by the Authorized Officer. During the course of construction this schedule shall be updated and resubmitted at 30-day intervals.

14. Surveillance and Maintenance

Permittee shall, during the life of the Pipeline permit and for so long as the Pipeline is in operation, conduct a surveillance and maintenance program applicable to the arctic environment in a timely manner and designed to provide for public safety, prevent damage to any resources adjacent to the Pipeline right-of-way, prevent erosion from the Pipeline right-of-way and maintain pipeline integrity. The surveillance and maintenance program shall include an effective communications system.

Records on construction, operation and maintenance activities shall be maintained by Permittee and regularly submitted as required to appropriate State and Federal agencies. Such records will include surveillance data, leak and break records, and necessary operational data. .

Roads or air strips shall be maintained by Permittee to give maintenance crews access to valves, pumping stations, and other facilities.

15. Electronically Operated Devices

Permittee shall screen, filter, or otherwise suppress any electronically operated devices, that are installed as part of the Pipeline which are capable of producing electromagnetic interference radiations, to the extent necessary so that such devices will not adversely affect the functioning of existing communications systems or navigational aids. In the event that physical obstructions such as towers or buildings are to be erected as part of, or in association with,

the Pipeline, their positioning should be such that they will not obstruct radiation patterns of line-of-sight communications systems, navigational aids, or similar systems.

16. Oil Spills

Permittee recognizes its prime responsibility for the protection of the public and environment from the contingency of oil spillage.

a. Reporting of Oil Leaks

All spills or leakage of oil or waste materials shall be recorded and reported by Permittee in accordance with 49 CFR, Part 180. Reports shall be filed with the Central Reporting Network as may be required by any joint Federal-State contingency plan which may be adopted and which pertains to the minimization of the effects of a spill of oil or other hazardous substances in Alaska or adjacent waters.

b. Containment of Oil Spills at Storage Tanks and Tank Farms

Permittee shall provide oil spill containment dikes or other structures around storage tanks at pumping stations and at the Valdez tank farm. The volume of the containment structures shall be at least: 1) one-hundred ten (110) percent of the total storage volume of the storage tanks in the relevant area, plus 2) a volume sufficient for maximum trapped precipitation and runoff which might be impounded at the time of the spill. Such structures shall be impervious so as to provide seepage free storage over reasonable periods of time.

c. Cleanup of Oil Spills

Permittee shall submit a contingency plan in conformance with the recommendations of the National Interagency Committee at least sixty (60) days prior to scheduled commencement of pumping. The plan shall: include oil spill control, disposal and cleanup; specify that the Interior agencies responsible for contingency plans in Alaska shall

be among the first to be notified in the event of a Pipeline failure resulting in oil spill; provide for immediate corrective actions, including control and cleanup of oil spills and restoration of the affected resource; and spell out that the Authorized Officer shall approve any materials or device used to control or clean up oil spills and shall approve any disposal sites or techniques selected to handle oily matter. Detailed information must be included for major river crossings, lakes, populated areas, pumping stations and terminals. The contingency plan shall include separate and specific oil spill cleanup techniques for 1) terrestrial, 2) lake, 3) river and stream, 4) marine, and 5) estuarine spills. The plan must be approved by the Authorized Officer prior to pumping oil through the Pipeline.

If at any time, including without limitation during any phase of the construction, operation or maintenance of the Pipeline, any oil or other pollutant should spill or escape from the Pipeline, the control and total removal, disposal and cleaning up of such oil or other pollutant, wheresoever found, shall be at the expense of Permittee. Upon failure of Permittee to control, dispose of, or clean up an oil spill, or to repair all damages resulting therefrom, the Authorized Officer shall take such measures as he deems necessary to control the spill, clean up the spillage and restore the area to as near its original condition as possible at the full expense of the Permittee.

17. Excavations

In excavation operations, Permittee shall use construction methods that will provide maximum protection to animals and human beings.

18. Termination of Use

Upon revocation or termination of the Pipeline permit or abandonment of any section of the Pipeline, Permittee shall remove all above-ground Pipeline sections, and restore the land to the satisfaction of the Authorized Officer.

Prior to capping the open ends of underground pipe sections, all oil and residues shall be removed from the pipe.

19. Pipeline Corrosion

Permittee shall provide detailed plans for corrosion resistant design and methods for early detection of corrosion. These will include: pipe material and welding techniques to be used and information on their particular suitability for the environment involved; details on the external pipe protection to be provided (coating, wrapping, etc.), including information on variation of the coating processes to cope with variations in environmental factors along the Pipeline route; plans for cathodic protection including details of impressed ground sources and controls to insure continuous maintenance of adequate protection over the entire external surface of the pipe; details of plans for monitoring cathodic protection current including spacing of current monitors; provision for periodic intensive surveys of trouble spots and regular preventive maintenance surveys and special provisions for abnormal potential patterns resulting from crossing of the right-of-way by other pipelines or cables; information on precautions to be taken in removing corrosive substances (e.g., saline water) from the crude prior to moving it to the pipeline. Permittee will also provide comments on the need for plans for periodic internal pitting surveys by electromagnetic or other means.

20. Seismic Monitoring

Permittee shall file with the Authorized Officer for approval a detailed plan for the monitoring of crustal strain and microseismic activity in the vicinity of the proposed Pipeline route.

Said monitoring network shall be constructed and in operation prior to use of the Pipeline.

The monitoring network shall include establishing of reference points on stable ground, placed at satisfactory intervals so as to form closed figures. Trilateration meas-

urements shall be made at time intervals not to exceed six months and to a probable error not to exceed two parts per million. As data on creep locations and rates are accumulated, Permittee shall install recording or telemetering creep meters where movement is rapid. The monitoring network shall also provide for clusters of seismonitors, with outputs telemeter to a central facility, where the Pipeline crosses major fault zones.

Data obtained from the network shall be provided to the Authorized Officer at regular intervals throughout the operational life of the Pipeline. Strain, creep, and microseismic data shall be used by Permittee to aid in the initiation of corrective measures to protect the Pipeline from breaking from tectonic strain.

C. Native Training

Permittee shall enter into an agreement with the Secretary of the Interior regarding recruitment, testing, training, placement, employment and job counseling of Alaska Natives.

Continuously during Pipeline construction, Permittee shall conduct a pre-employment and on-the-job training program for Alaska Natives, adequate to qualify them for initial employment and for advancement to higher paying positions thereafter.

Permittee shall do everything within its power to secure the employment of those Alaska Natives who successfully complete Permittee's training program.

Permittee shall inform the Authorized Officer of its discharge of any Alaska Natives, and of the reasons therefor, in advance of such discharge wherever possible or, if advance notice is impossible, as soon thereafter as is practicable.

Permittee shall furnish the Authorized Officer such information and reports concerning Alaska Native employment as the Authorized Officer shall require from time to time.

D. Regulation of Public Access

After construction is completed, Permittee shall permit free and unrestricted public access to and upon the Pipeline and access road rights-of-way for all lawful and proper purposes except areas designated as restricted by Permittee with the consent of the Authorized Officer.

During construction Permittee may regulate public access and vehicular traffic as required to facilitate operations and to protect the public and wildlife from hazards associated with the Project. For this purpose, Permittee shall provide warnings, flagmen, barricades and other safety measures as necessary.

Provisions must be made for suitable permanent crossings where Permittee's Pipeline right-of-way and related access roads cross existing roads, foot-trails, winter sled trails, or other rights-of-way.

During construction, Permittee shall provide alternate routes for existing roads and trails as determined by the Authorized Officer, whether or not these roads or trails are recorded.

E. Pollution Abatement

1. Pesticides and Herbicides

The use of pesticides and herbicides is limited to non-persistent and immobile types. An approved list of pesticides and herbicides, together with application constraints shall be obtained from the Authorized Officer.

2. Water Pollution

Permittee shall conduct its activities in a manner to prevent pollution of land and water, thereby protecting acquatic and terrestial life.

Toxic material or sediments shall not be released in any lake or water drainage in such concentrations as would

exceed acceptable water standards. Every effort shall be made to protect water bodies from damage by erosion and unnatural drainage conditions. In the design, construction and operation of the Pipeline, protection of water quality shall be of prime importance. Criteria for compliance will be the "Alaska State Plan-Water Quality Standards for Interstate Waters within the State of Alaska" as revised.

Unless waived by the Authorized Officer, dikes or cofferdams shall be installed to separate concrete work areas from lakes or streams during construction.

Mobile ground equipment shall be kept out of the waters of lakes, streams or rivers except for crossings within the right-of-way limits.

3. River and Stream Crossings

The Pipeline shall cross all rivers and streams completely underground unless a different means of crossing is approved in writing by the Authorized Officer.

4. Thermal Pollution

At all underground water crossings the Pipeline shall be placed at such depth and be so insulated that it will not degrade the water beyond standards set for thermal pollution in the State of Alaska.

If changes in the overburden take place so as to expose the pipe to natural water, the Pipeline will be additionally insulated from the water to the satisfaction of the Authorized Officer.

A standard stream crossing profile shall be filed in advance of Pipeline installation for review by the Authorized Officer.

F. Erosion Control

1. General

The design of the Pipeline, roads, and associated structures shall include specifications for the construction of

erosion control and drainage features that will minimize the concentration of water and thereby reduce erosive effects.

The erosion control measures such as water bars, contour furrows, water spreaders, diversion ditches, plugs, or other control measures shall be constructed to avoid induced and accelerated erosion and to lessen the possibility of forming new drainage channels resulting from construction activity on all Pipeline rights-of-way areas. All control measures must be designed with proper regard to minimize disturbance to the thermal equilibrium, thus minimizing the adverse effects of permafrost degradation.

The Authorized Officer shall be informed of all proposed erosion control measures.

2. Stream Banks

Excavated cuts through stream banks shall have side slopes that will not erode or slide.

Where practicable, unless otherwise approved by the Authorized Officer, temporary access over stream banks shall be made through use of fill ramps rather than by excavating through stream banks. Permittee shall remove such ramps upon termination of seasonal use or abandonment.

3. Water Crossings

At water crossings, the Pipe trench excavation shall stop an adequate distance from the water crossing to leave a protective plug (unexcavated material) at each bank. These plugs shall be left in place until the crossing grade is complete behind the plug and the pipe laying operation is begun. The plugs shall not be completely removed until absolutely necessary. The plugs shall be replaced with stable material on each bank as soon as the pipe is laid.

4. Disturbed Areas

Permittee shall conduct all construction, operation, and maintenance activities with minimum disturbance to vegetation.

Disturbed areas shall be restored by Permittee as nearly as practicable to their original condition as follows:

a. All disturbed areas shall be left in a stabilized condition. Stabilization practices shall include, as determined by the needs of specific sites: seeding; planting; mulching; and the placement of mat binders, soil binders, rock or gravel blankets, or structures.

b. Special attention shall be given to stream and river crossings so as to prevent erosion. Such measures shall not interfere with fish passage.

c. Material from the trench excavation in excess of that required to backfill around the pipe shall be disposed of in a manner approved by the Authorized Officer.

d. Seeding and planting shall be conducted during the first growing season and shall be repeated if unsuccessful on the first attempt. All other restoration shall be completed as soon as possible.

e. Unless other acceptable methods such as controlled burning or burial are approved by the Authorized Officer, all trees, snags, stumps or other woody material, not having commercial or construction value, shall be mechanically chipped and spread in a manner that will aid seeding establishment, soil stabilization and the minimization of permafrost degradation.

5. Disturbance of Natural Waters

All construction activities of Permittee which may create new lakes, drain existing lakes, significantly divert natural drainages, permanently alter stream hydraulics, disturb significant areas of streambeds, or appreciably degrade

water quality, shall be prohibited unless approved in advance by the Authorized Officer.

6. Areas of Unstable Soils

Areas having soils that are susceptible to slides and slumps, excessive settlement, severe erosion and soil creep shall be avoided wherever possible. However, if these areas cannot be avoided, or are encountered unexpectdly, Permittee shall design its construction to insure maximum stability. Permittee will continue soil investigations in conjunction with construction activities. Such data shall be made available to the Authorized Officer upon his request.

The Authorized Officer may require special construction methods, and or rerouting, where unstable conditions are encountered.

7. Permafrost Degradation

Permittee shall conduct studies to determine: (1) the most feasible route and best construction design through permafrost areas so as to prevent permafrost degradation that could result in progressive geomurphic degredation and (2) whether the Pipe should be buried or above ground. The potential effects of installing the pipe beneath the surface in moisture laden permafrost will be determined with regard to each segment of the Pipeline, and reports thereon shall be filed with the Authorized Officer prior to construction of each segment of the Pipeline. Construction methods shall be designed to prevent degradation of the permafrost in areas where such degradation would result in detrimental erosion or subsidence.

8. Off Right-of-Way Traffic

Permittee's vehicles shall not be operated outside the boundaries of the Pipeline, access or other roads, or other permitted areas, except with the consent of the Authorized Officer or when necessary to protect life, limb, or public property.

G. Sanitation and Waste Disposa[1]

All waste generated in road or Pipeline construction and operation shall be removed or otherwise disposed of in a manner acceptable to the Authorized Officer. All applicable standards and guidelines of the Alaska State Department of Health and Welfare, the United States Public Health Service and the Federal Water Pollution Control Administration shall be adhered to by Permittee. All incinerators shall meet the requirements of all applicable State and Federal laws and regulations and shall be used with maximum precautions to prevent forest and tundra fires. After incineration, material not consumed in the incinerator shall be disposed of in a manner approved in advance by the Authorized Officer.

Emissions from incinerators, pumps, motors, equipment and installations and other burning material, must meet the air quality standards of the United States Public Health Service and the State of Alaska.

The term "waste" as used in this stipulation means all discarded matter, including but not limited to human waste, trash, garbage, refuse, oil drums, petroleum products, ashes and equipment. The best practicable portable or permanent waste disposal systems shall be used and shall be approved in advance by the Authorized Officer.

H. Small Craft Passages

The creation of any permanent obstruction on any waters to the passage of canoes, boats, or other craft under forty feet in length, is prohibited.

I. Aesthetics

Permittee shall consider aesthetic values in planning, construction, and operation of the Pipeline and its associated facilities and roads. All permanent structures shall be painted a color or colors that harmonizes with their natural setting. The Authorized Officer may require such plans as he deems necessary to protect aesthetic values.

J. Timber

1. Commercial Timber

Prior to clearing operations, Permittee will enter into a contract with the United States for the purchase by Permittee of all merchantable timber situated within the Pipeline right-of-way.

2. Noncommercial Timber

Clearing and grubbing limits shall be approximately 10 feet outside of the edge of any cut or fill. Unless other methods, such as controlled burning or lopping and burial, are agreed upon between Permittee and the Authorized Officer in the clearing plan as acceptable for a given segment, all trees, snags, stumps or other woody material not having value to Permittee shall be mechanically chipped and spread in a manner that will aid seeding establishment, soil stabilization and the minimization of permafrost degradation. Permittee shall identify right-of-way clearing boundaries on the ground for each construction segment prior to clearing operations.

All timber and other vegetative material outside the right-of-way clearing boundaries and all blazed, painted or posted trees which are on or mark the clearing boundaries are reserved from cutting and removal with the exception of danger trees or snags designated as such by the Authorized Officer.

All trees, snags, or other woody material cut in connection with clearing operations shall be cut so that the resulting stumps shall not be higher than six (6) inches measured from the ground on the uphill side.

All trees, snags, and other woody material cut in connection with clearing operations shall be felled into the right-of-way and away from live water courses.

In areas where heavy equipment would be detrimental under the existing conditions, standard hand clearing operations will be used.

Logs shall not be skidded or yarded across any stream without prior approval of the Authorized Officer.

All debris, such as logs, chunks, and tops resulting from clearing operations and construction which may block stream flow, delay fish migration, contribute to flood damage, or result in streambed scour or erosion shall be removed.

No log landing shall be located within two hundred (200) feet of any live stream course.

Logs having a value to Permittee shall be neatly piled adjacent to the right-of-way clearing boundary if further use is contemplated by Permittee.

K. Wildlife

1. Hunting, Fishing, and Trapping

Permittee shall inform its employees, agents, contractors, subcontractors, and their employees, of applicable laws and regulations relating to hunting, fishing, and trapping.

2. Use of Explosives

At least thirty (30) days in advance of any underwater blasting Permittee shall submit to the Authorized Officer a plan for such blasting. The plan shall set forth blasting locations, types and amounts of explosives, date or dates of blasting, and the reason for the blasting.

No blasting shall be permitted underwater, or within one quarter (¼) mile of streams or lakes, without a permit from the Alaska Department of Fish and Game.

3. Buffer Strips

Except at approved crossings, the Pipeline shall be located so as to provide three hundred (300) minimum buffer strip of undisturbed land along all streams. Requests for exceptions to this provision shall be submitted in writing to the Authorized Officer at least thirty (30) days in advance of approval. The request shall include a description of the design criteria and time necessary to restore or enhance the stream habitat.

4. Fish Spawning Beds

"Fish spawning beds" means the areas, usually gravel, where anadromous and resident fish deposit their eggs.

Where channel changes cannot be avoided in designated anadromous fish spawning beds, new channels shall be constructed according to standards supplied by the Authorized Officer. Spawning beds shall be protected from sediment from all sources of construction activity. Where soil material is expected to be suspended in water as a result of construction activities, sediment settling basins shall be constructed to permit the removal of silt before it reaches the stream or lake. Special requirements may be made by the Authorized Officer for each stream system to protect spawning beds. Permittee shall repair all damage to fish spawning beds caused by construction, operation, or maintenance of the Pipeline.

5. Migration of Fish

Permittee shall provide for uninterrupted and safe upstream or downstream passage of fish. Any artificial structure or any stream channel change that causes a permanent blockage to migration of fish shall be provided with a permanent fish passage structure that meets all Federal and State requirements. The proposed design shall be submitted to the Authorized Officer at least thirty (30) days in advance of construction.

Unless otherwise provided for by appropriate State or Federal authority, culvert construction in water crossings shall meet the following minimum standards:

a. Water velocities at medium discharge will not exceed four (4) feet per second in any part of the culvert.

b. Installation shall be at zero gradient with the bottom of the outlet six (6) inches below the natural streambed to prevent erosion at the downstream end of the culvert.

c. Where necessary because of outfall erosion, a stilling basin shall be constructed at the outflow end of the culvert that is at least three (3) feet deep and twelve (12) feet long. The pool sides shall be stabilized with riprap or other appropriate method to prevent erosion.

d. Water shall be diverted around the work area in the streambed during installation of the culvert to reduce siltation.

e. Water diversion ditches or pumps shall be screened with a device approved by the Authorized Officer to prevent harm to migrating fish.

Abandoned water diversion structures shall be plugged and stabilized to prevent trapping or stranding of fish.

6. Seasonal Concentrations of Fish and Game

Key fish and wildlife areas may be closed to construction activities during periods of wildfowl nesting, migration, and spawning. The Authorized Officer shall provide Permittee written notice of closure.

From time to time, the Authorized Officer shall furnish Permittee a list of areas where closure may be required, together with anticipated dates of closure.

7. Big Game Movements

Permittee shall construct the Pipeline, both buried and above ground sections, so as to assure unrestricted passage and movement of big game animals.

L. Antiquities and Historical Sites

Permittee shall engage an archeologist approved by the Authorized Officer to provide surveillance and inspection of the Pipeline for archeological values.

If in connection with any operation under this permit Permittee excavates known or previously unknown archeological, paleontological, or historical sites, Permittee shall notify immediately said archeologist who shall investigate and provide an on-the-ground opinion regarding the protection measures to be undertaken by Permittee. The Authorized Officer may suspend that portion of Permittee's operations necessary to preserve evidence pending investigation of the site by said archeologist or his representative.

Two copies of all survey and excavation reports shall be filed with the Authorized Officer.

M. Fire Prevention

Permittee shall take all measures necessary or appropriate for the prevention and suppression of fires on the permit area and on other Federal lands. Permittee shall comply with all applicable laws and regulations, and with the instructions and directions of the Authorized Officer concerning the prevention and suppression of fires.

N. Campsites

Permittee or its contractors shall obtain special land use permits for each campsite from the Authorized Officer.

Upon abandonment or relocation of each campsite, the area shall be cleaned up and restored to a condition satisfactory to the Authorized Officer.

O. Material Sites

1. Purchase of Materials

Permittee shall make application in accordance with applicable regulations, to purchase construction materials, consummate a materials sale contract with advance payment, and submit a mining plan that must be approved before any materials are removed from the public lands.

Permittee shall utilize upland materials and existing material sites in place of clearwater stream materials when

reasonably available. Gravel and other construction materials shall not be taken from stream or river beds or shores or outlets of lakes that are or could be considered as spawning areas unless approved by the Authorized Officer.

2. Vegetative Screen

Permittee shall not cut or remove any vegetative cover within a minimum of five hundred (500) foot strip between roads and material sites unless authorized to do so in writing by the Authorized Officer. Permittee shall remove any debris created by its construction activities.

Where primary roads intersect the Pipeline right-of-way, a screen of vegetation native to the specific setting shall be established unless waived by the Authorized Officer in writing.

3. Layout of Material Sites

Material site boundaries should be shaped in such a manner as to blend with surrounding natural land patterns. Regardless of the layout of material sites, primary emphasis shall be placed on prevention of damage to vegetation and soil erosion.

4. Fish Protection

If material sites are approved adjacent to or in certain lakes, rivers or streams, the Authorized Officer may further require the construction of levees or berms to protect fish and prevent siltation or streams or lakes.

5. Restoration

All slopes shall be left in a stable condition.

Haul ramps, berms, dikes and other earthern structures shall be leveled and other structures removed unless otherwise directed by the Authorized Officer.

Material pits in stream and river bottoms and channels shall be connected to the stream by channels constructed to allow flow of water through the pit at median stream stage.

Vegetation, overburden and other materials removed from surfaces of material sites shall be disposed of by Permittee at termination of use of the site in a manner approved by the Authorized Officer. Vegetative debris which has been put through a chipper shall be spread evenly over material site slopes, together with other organic materials and topsoil. Permittee, during the first growing season following termination of use of the site, shall revegetate material site slopes through seeding and planting with suitable plant materials unless otherwise directed by the Authorized Officer.

Upon completion of material site restoration, Permittee shall immediately remove all equipment, materials and supplies from the sites.

PARTICIPATING AGENCIES

ALASKA

Federal

Department of the Interior
- Regional Coordinator
- Bureau of Land Management
- Bureau of Sport Fisheries and Wildlife
- Bureau of Commercial Fisheries
- Federal Water Pollution Control Administration
- Bureau of Mines
- U.S. Geological Survey
- Bureau of Indian Affairs
- National Park Service

Department of Defense
- Corps of Engineers, Alaska District
- Alaskan Command

Federal Field Committee for Development Planning

State

Department of Fish and Game

Department of Natural Resources, Division of Lands

Department of Highways

WASHINGTON

Federal Task Force on Alaskan Oil Development
Department of the Interior
Department of Defense
Department of Transportation
Department of Commerce
Department of Health, Education and Welfare
Department of Housing and Urban Development

THE SECRETARY OF THE INTERIOR
WASHINGTON

September 15, 1969

MEMORANDUM TO THE PRESIDENT

Subject: Preliminary Report of the Federal Task Force on Alaskan Oil Development

Attached is the Preliminary Report of the Federal Task Force on Alaskan Oil Development as requested in your Memorandum of May 9, 1969.

Since its inception, the activities of the Task Force have concentrated primarily on the application by the Trans Alaska Pipeline System for an 800-mile right-of-way from Alaska's North Slope to the Port of Valdez on the Pacific Ocean.

This report concisely examines the background and the organization of the Task Force, and the scope of interrelated problems—environmental, technological, social, and legal, —involved with a project of this magnitude over arctic, remote, and wilderness terrain. The report also discusses the major problems still outstanding, and our intentions for future activity.

The Task Force has been guided by your charge that oil be explored and developed "without destruction and with

minimum disturbance" to the environment of arctic Alaska.

/s/ WALTER J. HICKEL
Walter J. Hickel

Attachment

FEDERAL TASK FORCE ON ALASKAN OIL DEVELOPMENT
A Preliminary Report to the President

September 15, 1969

Background

The petroleum discovery on Alaska's North Slope, announced in August 1968, by Atlantic-Richfield and Humble Oil and Refining Companies represents a reservoir of major importance to the energy and defense posture of the Nation.

In anticipation of the array of problems—environmental, technological, social, and legal—involved with the extent and rapidity of North Slope oil development the Secretary of the Interior established the North Slope Task Force on April 18, 1969. Chaired by the Under Secretary of the Interior it was composed of eight departmental bureau and office heads, and charged with the responsibility of insuring environmental and orderly development of Federal lands on Alaska's North Slope.

On May 9, 1969, during the Under Secretary's 5-day inspection of the North Slope, the President suggested by memorandum to Secretary Hickel that the North Slope Task Force be enlarged into a Government-wide group (Enclosure 1).

In addition to the other departments for whom the President recommended membership, the Secretary of Housing and Urban Development was invited to designate a representative (Enclosure 2). This group is composed of departments having direct program involvement in Alaska. Three other offices were invited to participate as

observers or liaison members: the Office of Science and Technology, the National Science Foundation, and the Bureau of the Budget.

Additionally, several select groups were identified as members for communication and coordination. These include the State of Alaska, the Federal Field Committee for Development Planning in Alaska, the Department of the Interior Field Committee in Alaska, and the Conservation/Industry "Ad Hoc" Committee.

Since its inception on June 5, 1969, this Government-wide group has met five times, considering in succession (1) the extent of present Federal involvement in Alaska and a general review of environmental, transportation, and social problems attending oil development (June 5); (2) the application by the Trans Alaska Pipeline System for an 800-mile right-of-way from the North Slope to Valdez (June 17); (3) a presentation by industry regarding the extent of their planning and preparation (July 1); an application by the State of Alaska to select a portion of the route (Livengood to the Yukon River) for a secondary highway (August 12); and (5) the two-volume set of proposed environmental stipulations applying to the overall pipeline right-of-way (September 11).

Accomplishments

The attention of the Task Force has focused primarily on the application by the Trans Alaska Pipeline System (TAPS), a joint venture of Atlantic Pipeline Company, BP Pipeline Corporation and Humble Pipeline Company, which was received on June 9, 1969 by the Anchorage office of the Bureau of Land Management. A copy of the application and an accompanying letter to Under Secretary of the Interior Train were hand-delivered to the Task Force on June 10, 1969.

Simultaneously with the receipt of the application, the Task Force submitted to the Trans Alaska Pipeline a set of 79 questions reflecting the concerns of Department of the Interior agencies. The TAPS' answers to these questions were received on June 20. Following an examination

of the answers and two meetings with industry, Interior bureaus submitted to the Under Secretary individual assessments upon TAPS' "state of technological readiness." The unanimous judgment by Interior bureaus was that TAPS had not adequately finalized their own plans on a technological level for the construction of the pipeline or ancillary projects. Each bureau raised serious questions regarding the impending time frame and expressed concern over the industry's ability to use data from their own ongoing studies.

The application requested affirmative action "by July." An interim response was made by Secretary Hickel on June 27, which gave assurance that the application would be granted when several conditions, reflecting environmental, legal, procedural and native interest concerns were met (Enclosure 3).

In early July, an extensive team of Interior, other Federal, and State officials prepared an initial draft of stipulations to accompany and condition the granting of the right-of-way. This set arrived in Washington on July 22; was examined, revised, edited, rebound and distributed to the State of Alaska, industry, outside members of the Task Force, and the interested public on August 8. Their review and comment were solicited by September 15.

On July 22, the State of Alaska requested a modification of the Alaskan land freeze for the purpose of building a secondary highway from Livengood to the Yukon River which, by agreement, TAPS would build and the State accept following completion of adjacent pipeline construction. On July 29, the Secretary indicated to the Senate and House Committees on Interior and Insular Affairs his intention of lifting the freeze for this purpose. The Chairmen of the respective committees did not indicate disapproval, and the freeze order was modified for this 53-mile highway section on August 13.

On August 29-30 public hearings on the pipeline application were held at the University of Alaska at Fairbanks. The hearing was presided over by the Under Secre'ary

and an Interior panel composed of the Assistant Secretary for Fish and Wildlife, Parks, and Marine Resources, the Director of the Geological Survey, the Department of the Interior Regional Coordinator, the State Director, Bureau of Land Management, and a Special Assistant to the Secretary.

Outstanding Problems—The Scope of Concern

The application for an 800-mile pipeline right-of-way across Alaska has brought together a complex and interrelated scope of environmental, technological, social, and legal problems, the solution to some of which are still outstanding. This section outlines and summarizes the parameters of these concerns.

Permafrost

Permafrost is perpetually frozen ground, of rock, soil, and ice that has remained below freezing for two or more years. It underlies a significant percent of the State of Alaska. *Tundra* may be considered the topmost layer of soil and vegetation that insulates the permafrost, alternately thawing in summer and freezing in winter. It exists in a state of quasi- (or what is commonly termed delicate) equilibrium. A disturbance to the insulating mat of vegetation disturbs the entire thermal regime, causing it to thaw in a manner that it otherwise would not. This thawing can cause differential subsidence, erosion, and related frost action of severe and major extent. A Geological Survey Professional Paper, published in July, examines the geologic/environmental factors unique to the Arctic which present acute engineering problems for design, building, and maintenance of construction projects.

The problems attendant on pipeline construction are made more severe by the temperature of the oil which is anticipated to arrive at wellhead at 160° F. A recent Geological Survey computer analysis on permafrost degradation adjacent to a hot pipeline calculates that a melt zone of at least 25 feet deep in the first year could be expected.

Other calculations including those of industry have estimated this melt zone in excess of 300 feet with time.

A working group of Federal, State of Alaska and industry specialists is presently examining possible solutions to this problem. Alternative solutions include routing the pipeline around, or elevating it above, soil areas of high moisture content. TAPS is conducting a further core drilling investigation of soil conditions in high moisture areas.

Gravel

Gravel is used as an insulating layer to maintain the thermal equilibrium of permafrost underlying construction activities. The total requirement for gravel is estimated by TAPS to total 13, 329,000 cubic yards. An acceptable source of gravel must be found.

Seismic activity

Large segments of the pipeline route cross areas of known seismic activity. The historic frequency and magnitude of major earthquakes are most severe near Valdez. Some faults, crossing other portions of the route, may be subject to slow, earth adjustments or "creeping." The design, engineering, and location of the pipeline must take into consideration both types of seismic movement.

Solid and Human Waste

The rates of biological degradation of wastes, both solid and liquid, are extremely slow in the Arctic, and waste treatment presents unique and difficult problems. The proposed stipulations specify that all disposal systems shall meet the standards of the Alaska State Department of Health and Welfare, U.S. Public Health Service, and the Federal Water Pollution Control Administration.

Water Pollution

The most critical danger for water pollution is that resultant from an oil spill. TAPS has indicated that the capacity of the pipeline is 500,000 gallons per mile. Spillage

of one-mile capacity of this pipeline would equal nearly twice the total amount of oil lost at Santa Barbara.

The operation of tankers, in either the Beaufort Sea or Prince William Sound, produces a related problem. Inbound, the tankers will be loaded with ballast, sea water mixed with oil dredge, that must be discharged prior to loading of crude. It is necessary for the Task Force to receive firm assurance that pipeline technology, construction and operation have been perfected to give maximum standards against fresh and salt water pollution.

Fish and Wildlife

The Brooks Range and North Slope of Alaska are accurately regarded as the last and, until recently, most untouched wilderness areas in North America. It is certain that human and industrial activity will have effects on the presence and migration of some species. The Department of the Interior is continuing to work closely with the State of Alaska and private interests to minimize disturbances to the fish and wildlife along the right-of-way.

ALASKAN NATIVES

The low income, substandard living conditions, and absence of opportunity for Alaska natives have been well documented. These considerations and the potential opportunities that oil developments might provide, have been given important consideration by the Task Force. The proposed stipulations include strong provisions to insure against discrimination; to insure full and equal opportunity; to insure equal job advertising in Alaska; to insure preemployment and on-the-job training; and to allow for suspension or cancellation of the permit in the event of noncompliance.

LEGAL AND PROCEDURAL MATTERS

The legal and procedural problems inherent in the TAPS application are summarized below:

The Land Freeze: Public Land Order 4582, signed on January 17, 1969, withdraws all public and otherwise unreserved lands in Alaska from appropriation or disposition for the determination and protection of the rights of Alaskan natives. During his confirmation hearings, the Secretary of the Interior stated that he would not revoke or modify the order except (1) in case of public necessity and in order to serve important purposes; and (2) that in such cases he would first seek the concurrence of the Interior Committee of the Congress.

As a step precedent to granting the application, therefore, the Secretary must inform the respective committees of his intention to lift the freeze for this 800-mile right-of-way.

Responses by Alaskan Natives: The Secretary's agreement with the Senate Committee does not mention obtaining native village comments on nearby projects. Chairman Aspinall, however, under certain circumstances in the past, has recommended that notice of the project be given to native villages located within one mile of the project; and that their comments be obtained and evaluated prior to approval.

The Secretary of the Interior, by telegram, on June 23, has informed six native associations of the TAPS' application and requested their comments. Two preliminary and no final responses have been received.

Mapping Requirements: The authority under which the pipeline right-of-way has been requested (43 CFR 2230) requires that the application be accompanied by a map showing the survey of the right-of-way properly located with respect to public land surveys, and showing courses and distances of the center line. Similar requirements exist for material sites (such as gravel) and for special use permits.

These requirements did not accompany the application, and are still outstanding. By regulation it is necessary to know where a right-of-way is going before an application can be approved. TAPS indicates that it expects to comply with this requirement by a date in November.

Likewise, the sites for pumping plants must be described and located, with the amount of land indicated and all structures in it depicted that are necessary for proper use of the right-of-way. This requirement has not been satisfied.

Width of the right-of-way: The application requests a 54-foot wide pipeline right-of-way together with an additional parallel and adjacent 46-foot right-of-way. Further, for all sections between Livengood and the North Slope, the applicants request another 100-foot right-of-way for a construction road, making a total requirement of 200 feet in width for that distance.

The authorizing statute (30 U.S.C. 185) limits pipeline rights-of-way to 25 feet on either side of center line, or to a total of 54 feet. Discussions are continuing between the Department and TAPS to determine the exact method by which TAPS will acquire the additional 46 feet for the pipeline right-of-way and the further addition of a 100-foot right-of-way for a construction road.

Previously Withdrawn Areas: In addition to the public domain, the proposed right-of-way crosses land under the jurisdiction of the Federal Power Commission (Ramparts), the Department of the Air Force (Eielson Air Force Base), the Department of the Army (Fort Greely), the U.S. Forest Service (Chugach National Forest), and the State of Alaska (State selected lands). Both concurrence and conditioning stipulations from these agencies will be required before rights-of-way can be approved across lands under their jurisdiction. The Task Force is working closely with these agencies on this matter.

Material and Borrow Needs: In addition to the mapping requirements previously discussed, permission for the excavation of borrow material is dependent upon a sale made either through negotiated procedures, or by advertising through competitive bidding. In either case, an appraisal of fair market value is required.

Federal regulations (43 CFR 23) additionally require a mining and rehabilitation plan for each and every material site be submitted, and approved, prior to removal or disturbance of the surface.

Disputed Lands: The State of Alaska has applied for blanket selection of lands in the area of Valdez. These lands are subject to the freeze imposed by Public Land Order 4582 on January 17, 1969, and have not been approved for State selection. On July 22, 1969, a private protest was filed against State selection with the Anchorage Bureau of Land Management Office. The protest claims title to certain tracts in the Valdez area, which have been selected by the State, and over which the pipeline corridor has been planned.

The State of Alaska, as the adverse party in interest, has advised the Bureau of Land Management that it will take no action on this protest. Consequently, the Anchorage office of the Bureau of Land Management will reject the protest, allowing the protestant to appeal his case to the Director, then possibly the Secretary of the Interior, and ultimately the District courts.

In addition to this protest, a suit was filed on July 14, 1969 to quiet title to other lands adjacent to those under protest, and involved with the development of the pipeline terminus areas.

Current Status

An outline of the major concerns regarding the pipeline application is contained in Secretary Hickel's letter to TAPS of June 27 (Enclosure 3). This letter provides a check list of the category of requirements, as yet outstanding, that must be satisfied:

1. *Law and regulation:* The standard requirements for mapping and power plant descriptions must be met. TAPS estimates this will be provided by a date in November.
2. *Environmental concerns:* Engineering design and pipeline location must be such that thermal degradation in permafrost areas is avoided.

3. *Native interests:* Substantial safeguards for Alaskan natives, as well as for environmental values, are provided for in the proposed stipulations. It is expected that the Task Force will finalize these stipulations by the first of October. Stipulations for lands under military jurisdiction are also in the final stages of preparation.

4. *Committees of Congress:* The Interior and Insular Affairs Committees must be informed of the Secretary's intention to lift the freeze for the pipeline right-of-way. This is a necessary step precedent to granting the application and could be accomplished by the first of November, perhaps sooner. A satisfactory response from each committee must be obtained.

5. *The State of Alaska:* Governor Miller has been provided with a set of the August edition of the stipulations and his review and comments requested.

The policy of the Department continues to be to give priority attention to the application and to process it as rapidly as the public interest permits.

Future Developments

Following the finalizing of the stipulations for the Trans Alaska Pipeline, the immediate focus of the Task Force will turn to the considerably broaded problems weighing upon the proper administration of the public domain in Alaska—particularly those on the North Slope—involved with mineral and seismic exploration, drilling, and oil and related natural resource development. This effort will be a natural outgrowth and expansion of the present concentration on the pipeline right-of-way, and a great number of the stipulations currently under development for the pipeline can be appropriately extended to the larger problems arising from future natural resource development.

In our progress we have been guided by the view that oil development and environmental protection are not inconsistent. We have attempted in our proceedings to reach an equitable balance between the just concerns . . . and

timetables . . . of industry, and the just concerns . . . and timetables . . . of the public.

We have developed within the Task Force a close spirit of understanding and cooperation between government, conservation, and industry representatives. This understanding and cooperation is developing into a new perception of the course of public responsibility and with it a case history in environmental management.

/s/ Russell E. Train
Russell E. Train
Chairman

TRANS ALASKA PIPELINE SYSTEM
2100 Travis Street
Houston, Texas 77002
Telephone (713) 222-7294
Telex 762 330

APPLICATION FOR PIPELINE RIGHT-OF-WAY

December 22, 1969

Director
Bureau of Land Management
Department of Interior
Interior Building
Washington, D.C. 20240

Dear Sir:

Atlantic Pipe Line Company, BP Pipe Line Corporation, Humble Pipe Line Company, Mobil Pipe Line Company, Home Pipe Line Company, Phillips Petroleum Company, Union Oil Company of California and Amerada Hess Corporation submit this application for an oil pipeline right-of-way, for the construction of an oil pipeline system extending from a point in the north line of Township 8 North, Range 14 East, Umiat Meridian, to a point in Section 13, Township 9 South, Range 7 West, Copper River Meridian.

This application is made pursuant to the regulations contained in Title 43, CFR, Subpart 2234, and in support

of such application, the following is submitted. This application supplements and amends a prior filing of June 10, 1969, and is submitted in such a form to replace the prior filing and is complete within itself.

1. Applicants agree that the right-of-way, if approved, will be subject to the terms and conditions of the applicable regulations contained in Title 43, CFR, Subpart 2234, except that applicants respectfully request that the requirement that the application be filed in accordance with Title 43, CFR, § 1821.2 be waived to permit the filing of this application directly with the Director of the Bureau of Land Management, Washington, D.C. This waiver is being requested because of the complexities of the permit being sought and the fact that the requested right-of-way will traverse more than one land district jurisdiction.

2. This application is made pursuant to Section 28 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 449) as amended by the Acts of August 21, 1935, and August 12, 1953 (49 Stat. 678; 67 Stat. 557; 30 USC 185) and regulations promulgated thereunder.

3. The primary purpose for which said right-of-way will be used is the construction, maintenance and operation of a 48″ diameter pipeline system and related appurtenances for the transportation of liquid crude petroleum from the North Slope of Alaska to a marine terminal at Port Valdez.

4. As required by Title 43, CFR, § 2234.1-2 (b) the following listed documents are being submitted, or have been submitted as noted below, for the respective applicants:

Atlantic Pipe Line Company

(a) Certified copy of corporate charter (previously submitted and on file in BLM Qualification File No. AA 5722, State Office, Anchorage, Alaska).

(b) Certificate of qualification to do business in Alaska (on file in aforesaid BLM File No. AA 5722).

(c) Resolution of Board of Directors wherein officers of said corporation are given sufficient authority to make this

application (on file in aforesaid BLM File No. AA 5722) and to execute the Power of Attorney listed as (e) below.

(d) A common carrier stipulation (on file in aforesaid BLM File No. AA 5722).

(e) Power of Attorney authorizing the undersigned to execute this application.

(f) Corporate By-Laws (previously filed BLM No. AA 5722).

BP Pipe Line Corporation

(a) Certified copy of corporate charter (previously submitted and on file in BLM Qualification File No. AA 5722, State Office, Anchorage, Alaska).

(b) Certificate of qualification to do business in Alaska (on file in aforesaid BLM File No. AA 5722).

(c) Resolution of Board of Directors wherein officers of said corporation are given sufficient authority to make this application (on file in aforesaid BLM File No. AA 5722).

(d) A common carrier stipulation (on file in aforesaid BLM File No. AA 5722).

(e) Power of Attorney authorizing the undersigned to execute this application.

(f) Corporate By-Laws (previously filed BLM No. AA 5722).

Humble Pipe Line Company

(a) Certified copy of corporate charter (previously submitted and on file in BLM Qualification File No. AA 5722, State Office, Anchorage, Alaska).

(b) Certificate of qualification to do business in Alaska (on file in aforesaid BLM File No. AA 5722).

(c) Resolution of Board of Directors wherein officers of said corporation are given sufficient authority to make this application (on file in aforesaid BLM File No. AA 5722).

(d) A common carrier stipulation (on file in aforesaid BLM File No. AA 5722).

(e) Power of Attorney authorizing the undersigned to execute this application.

(f) Corporate By-Laws (previously filed BLM No. AA 5722).

Note: Copies or duplicate originals of the instruments referred to above as having been previously filed in BLM File No. AA 5722, are attached herewith for your ready reference.

Mobil Pipe Line Company

(a) Certified copy of corporate charter.

(b) Certificate of qualification to do business in Alaska.

(c) Resolution of Board of Directors wherein officers of said corporation are given sufficient authority to make this application.

(d) A common carrier stipulation.

(e) Power of Attorney authorizing the undersigned to execute this application.

(f) Corporate By-Laws.

Home Pipe Line Company

(a) Certified copy of corporate charter.

(b) Certificate of qualification to do business in Alaska.

(c) Resolution of Board of Directors wherein officers of said corporation are given sufficient authority to make this application.

(d) A common carrier stipulation.

(e) Power of Attorney authorizing the undersigned to execute this application.

(f) Corporate By-Laws.

Phillips Petroleum Company

(a) Certified copy of corporate charter.

(b) Certificate of qualification to do business in Alaska.

(c) Resolution of Board of Directors wherein officers of said corporation are given sufficient authority to make this application.

(d) A common carrier stipulation.

(e) Power of Attorney authorizing the undersigned to execute this application.

(f) Corporate By-Laws.

Union Oil Company of California

(a) Certified copy of corporate charter.

(b) Certificate of qualification to do business in Alaska.

(c) Resolution of Board of Directors wherein officers of said corporation are given sufficient authority to make this application.

(d) A common carrier stipulation.

(e) Power of Attorney authorizing the undersigned to execute this application.

(f) Corporate By-Laws.

Amerada Hess Corporation

(a) Certified copy of corporate charter.

(b) Certificate of qualification to do business in Alaska.

(c) Resolution of Board of Directors wherein officers of said corporation are given sufficient authority to make this application.

(d) A common carrier stipulation.

(e) Power of Attorney authorizing the undersigned to execute this application.

(f) Corporate By-Laws.

5. Applicants are submitting herewith maps showing a survey of the requested right-of-way as follows:

(a) Alignment map AL-00-G2, dated August, 1969, revision # 1 dated October 31, 1969, sheets 1 through 77.

(b) Alignment map AL-00-G2, dated September 25, 1969, sheets 77A through 77F.

Sheets 77A through 77F of the Alignment map will be replaced by aerial photo based maps currently being prepared.

6. Your applicants request that they be granted promptly the right-of-way permit in accordance with the terms and conditions set out in 43 CFR § 2234.1-3 (c) and such other specified conditions as may be found to be necessary in order to render its use compatible with the public interest.

A check in the amount of Ten Dollars ($10.00) is enclosed with this application.

Concurrently with this application, applicants are submitting separately applications for special land use permits, one for additional access and construction space along the pipeline, which together with this right-of-way, will make available for applicants construction a strip of land 100 feet in width and a special land use permit 200 feet in width to contain the pipeline construction surface and haul road.

If you have any questions concerning this application or if you desire any further information, please wire or call collect, Kenneth P. Fountain, 2100 Travis Street, Houston, Texas 77002, telephone (713) 222-6166.

Respectfully submitted,

ATLANTIC PIPE LINE COMPANY
BP PIPE LINE CORPORATION
HUMBLE PIPE LINE COMPANY
MOBIL PIPE LINE COMPANY
HOME PIPE LINE COMPANY
PHILLIPS PETROLEUM COMPANY
UNION OIL COMPANY OF CALIFORNIA
AMERADA HESS CORPORATION

BY:
Their Agent and Attorney-in-Fact

APPENDIX C
Page 1 of 2 pages

(May 1968) (Formerly 4-329) DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

BUDGET BUREAU NO. 42-R1424

Land Office and Serial Number

SEE INSTRUCTIONS ON REVERSE

SPECIAL LAND-USE APPLICATION AND PERMIT

1. Name (first, middle initial, and last) Address (include zip code) Care of
Atlantic Pipe Line Company
BP Pipe Line Corporation
Humble Pipe Line Company (contd above)
Trans Alaska Pipeline System
2100 Travis Street
Houston, Texas 77002

2a. Give the legal description of the public lands for which you are applying

This application is for an additional access and construction space extending 11 feet on one side and 35 feet on the opposite side of an oil pipeline right-of-way extending from a point in the north line of Township 8 North, Range 14 East, Umiat Meridian, to a point in Section 13, Township 9 South, Range 7 West, Copper River Meridian as requested by Application For Pipeline Right-Of-Way dated December 22, 1969. (Maps of aforementioned pipeline right-of-way attached to application of December 22, 1969.

b. For how many years are you requesting this permit? (*Not to exceed five years*) Five

c. Are the lands adjacent to a highway? ☐ Yes ☐ No (*If "yes," complete the following*) In Part

Type of highway ☐ Federal ☒ State ☐ City | Highway number Elliot Highway
Richardson Highway

d. How many miles are the lands from the nearest city or town? 3.0 miles Delta Jct.; 1.5 miles Tenderfoot; 0.5 miles Wiseman; 4.5 miles Livengood; 6.0 miles Fairbanks; 4.0 miles North Pole; 4.0 miles Salcha; 2.0 miles Glennallen; 1.2 miles Copper Center; 5.0 miles [illegible]

3a. Are you 21 years of age or over? ☐ Yes ☐ No NOT APPLICABLE | b. Are you a citizen of the United States? ☒ Yes ☐ No

c. As applicant, are you a ☐ Partnership ☐ Association ☒ Corporation Eight separate corporations listed above

d. Are the statements required by Instruction Number 2 attached? ☐ Yes ☐ No Refer to BLM Qualifier File No. A-5722

e. As applicant, are you an agency of the ☐ Federal Government ☐ State Government ☐ Political subdivision of any State? NO

4. Have you examined the lands described above? [X] Yes [ ] No

5a. Are the lands now improved, occupied, or used? [ ] Yes [X] No *(If "yes," describe improvements and purposes, and identify users and occupants)*

b. Are there springs or water holes on the lands? [ ] Yes [ ] No *(If "yes," give particulars)*
UNKNOWN

c. What is the proposed source of water for domestic or other use?
NOT APPLICABLE

d. Do the lands contain minerals? [ ] Yes [ ] No *(If "yes," specify)*
UNKNOWN

e. Do the lands contain timber? [ ] Yes [ ] No *(If "yes," list species and volume of timber)*
Species and Volume Unknown

6a. What do you propose to use the lands for?
Additional access and construction space for the construction of an oil pipeline

b. What improvements do you intend to make on the lands? *(Describe improvements and attach drawings, if convenient)* Land will be cleared to facilit the construction of an oil pipeline as identified by Application For Pipeline Right-Of-Way dated December 22, 1

c. What is the estimated cost of proposed improvements?
$ UNKNOWN

d. What are the proposed sanitation facilities? In accordance with Paragraph G Trans Alaska Pipeline System Stipulations - United States Department of Interior dated September 1969

7. Are you making this application for your own use and benefit? [X] Yes [ ] No *(If "no," explain)*

8. Have you enclosed the filing fee of $10? [X] Yes [ ] No *(See Instruction Number 3)*

I CERTIFY That the information given by me in this application is true, complete, and correct to the best of my knowledge and belief and is given in good faith.

George G. Hughes, Jr.

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APPENDIX C
Page 2 of 2 pages
Amerada Hess Corporation

Mobil Pipe Line Company
of Trans Alaska Pipeline System
2100 Travis Street
Houston, Texas 77002

to use the following-described lands: This application is for an additional access and construction space extending 11 feet on one side and 35 feet on the opposite side of an oil pipeli right-of-way extending from a point in the north line of Township 8 North, Range 14 E Umiat Meridian, to a point in Section 13, Township 9 South, Range 7 West, Copper River Meridian as requested by Application For Pipeline Right-Of-Way dated December 22, 196 (Maps of aforementioned pipeline right-of-way attached to application of December 22,

Section , Township , Range , Meridian, State of

for the purpose of

and subject to the following conditions:

1. This permit is issued for the period from , 19 , to , 19 , and is revocable for any breach of the conditions hereof. It is also revocable at the discretion of the authorized officer of the Bureau of Land Management, at any time, upon notice, if in his judgment the lands should be devoted to another use. The permit is subject to valid adverse claims heretofore or hereafter acquired.

2. The permittee shall pay annually, in advance, to the authorized officer as rental the sum of dollars, or such other sum as may be required if an adjustment of rental is made.

3. The permittee shall observe all Federal, State, and local laws and regulations applicable to the premises, and to the erection or maintenance of signs or advertising displays, including the regulations for the protection of game birds and game animals, and shall keep the premises in a neat, orderly, and sanitary condition.

4. The use or occupancy of the land under this permit shall commence within months from the date hereof and shall be exercised at least days each year.

5. The permittee shall take all reasonable precautions to prevent and suppress forest, brush, and grass fires, and to prevent the pollution of waters on or in the vicinity of the lands.

6. Authorized representatives of the Department of the Interior and other Federal agencies, and game wardens shall at all times have the right to enter the premises on official business.

7. The permittee shall not enclose roads or trails common in public use.

8. The permittee shall pay the United States for any damage to its property resulting from this use.

9. The permittee shall immediately notify the authorized officer of a change of address.

10. This permit is subject to all of the applicable provisions of the regulations (43 CFR, Subpart 2236) which are made a part hereof.

11. The permittee agrees to have the serial number of this permit marked or painted on each advertising display erected or maintained under the authority of such permit.

12. The permittee shall not cut any timber on the land without prior permission of the authorized officer.

13. This permit is subject to the provisions of Executive Order No. 10925 of March 6, 1961, as amended, which relate to the nondiscrimination clauses. A copy of this order may be obtained from the signing officer.

14. Special Conditions:

(Authorized Officer)

(Date) (Title)

INSTRUCTIONS

1. This application may be submitted to any local office of the Bureau of Land Management having jurisdiction over the lands. It must be submitted in *duplicate*.

2. An application by a partnership or association must be accompanied by a statement by each member that he is a citizen of the United States or has filed a declaration to become a citizen. An application by a corporation must be accompanied by a statement showing that the corporation is authorized to hold land in the State in which the land is located and that the person making the application is authorized to act for the corporation.

3. This application must be accompanied by a filing fee of governmental agency. Checks must be made payable the Bureau of Land Management.

4. If this application is for permission to erect an advertising display or sign, the applicant must furnish an accurate and fully descriptive diagram, sketch, or photograph (at least 3" x 5") of the sign or display to be used showing the dimensions, type of construction, wording, and the advertising material to be included. A plan of illumination, if any, and the name of the owner of the land, and (2) a photograph (at least 3" x 5") of the site on which the sign or display is to be erected.

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APPENDIX D

Page 1 of 2 pages

BUREAU OF LAND MANAGEMENT

Land Office and Serial Number

SPECIAL LAND-USE APPLICATION AND PERMIT

SEE INSTRUCTIONS ON REVERSE

Name (first, middle initial, and last)	Address (include zip code)
Alyeska Pipe Line Company BP Pipe Line Corporation Humble Pipe Line Company (contd above)	Care of Trans Alaska Pipeline System 2100 Travis Street Houston, Texas 77002

2. Give the legal description of the public lands for which you are applying.
This application is for a special land use permit 200 feet in width to contain the pipeline construction surface and haul road from a point in the north line of Township 8 North, Range 14 East, Umiat Meridian, to a point in Section 7, Township 12 North, Range 10 West, Fairbanks Meridian, as referred to in part by Application For Pipeline Right-Of-Way dated December 22, 1969. (For routing of aforementioned haul road refer to Alignment Map AL-00-02, dated September 25, 1969.)

[redacted]

3. For how many years are you requesting this permit? (*Not to exceed five years*) Five

4. Are the lands adjacent to a highway? ☐ Yes ☒ No (*If "yes," complete the following*)

a. Type of highway ☐ Federal ☐ State ☐ City NOT APPLICABLE | Highway number NOT APPLICABLE

d. How many miles are the lands from the nearest city or town? 0.5 miles Wiseman, Alaska
4.5 miles Livengood, Alaska

5. a. Are you 21 years of age or over? ☐ Yes ☐ No NOT APPLICABLE | b. Are you a citizen of the United States? ☒ Yes ☐ No

c. As applicant, are you a ☐ Partnership ☐ Association ☒ Corporation Eight separate corporations listed above

d. Are the statements required by Instruction Number 2 attached? ☐ Yes ☐ No Refer to BLM Case File No. AA5722

e. As applicant, are you an agency of the ☐ Federal Government ☐ State Government ☐ Political subdivision of any State? NO

6. Have you examined the lands described above? ☒ Yes ☐ No

5a. Are the lands now improved, occupied, or used? ☐ Yes ☒ No *(If "yes," describe improvements and purposes, and identify users and occupants)*

b. Are there springs or water holes on the lands? ☐ Yes ☐ No *(If "yes," give particulars)*
UNKNOWN

c. What is the proposed source of water for domestic or other use?
NOT APPLICABLE

d. Do the lands contain minerals? ☐ Yes ☐ No *(If "yes," specify)*
UNKNOWN

e. Do the lands contain timber? ☒ Yes ☐ No *(If "yes," list species and volume of timber)*
Species and Volume Unknown

6a. What do you propose to use the lands for?
Construction of Haul Road

b. What improvements do you intend to make on the lands? *(Describe improvements and attach drawings, if convenient)* Land will be cleared and 28 feet gravel surface road constructed with necessary drainage and timber trestle bridges where required.

c. What is the estimated cost of proposed improvements?
$100,000,000

d. What are the proposed sanitation facilities? In accordance with Paragraph G Trans Alaska Pipeline System Stipulations - United States Department of Interior dated September 1969.

Are you making this application for your own use and benefit? ☒ Yes ☐ No *(If "no," explain)*

8. Have you enclosed the filing fee of $10? ☒ Yes ☐ No *(See Instruction Number 3)*

I CERTIFY That the information given by me in this application is true, complete, and correct to the best of my knowledge and belief and is given in good faith.

George C. Hughes, Jr.
Agent and Attorney-In-Fact

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APPENDIX D
Page 2 of 2 pages

Mobil Pipe Line Company
Amerada Hess Corporation

Trans Alaska Pipeline System
60 Travis Street
Houston, Texas 77002

to use the following-described lands: This application is for an additional access and construction space extending 11 feet on one side and 35 feet on the opposite side of an oil pipeline right-of-way extending from a point in the north line of Township 8 North, Range 14 East, Umiat Meridian, to a point in Section 13, Township 9 South, Range 7 West, Copper River Meridian as requested by Application For Pipeline Right-Of-Way dated December 22, 1969. (Maps of aforementioned pipeline right-of-way attached to application of December 22, 1969

Section , Township , Range , Meridian, State of

for the purpose of

and subject to the following conditions:

1. This permit is issued for the period from , 19 to , 19 , and is revocable for any breach of the conditions hereof. It is also revocable at the discretion of the authorized officer of the Bureau of Land Management, at any time, upon notice, if in his judgment the lands should be devoted to another use. The permit is subject to valid adverse claims heretofore or hereafter acquired.

2. The permittee shall pay annually, in advance, to the authorized officer as rental the sum of dollars, or such other sum as may be required if an adjustment of rental is made.

3. The permittee shall observe all Federal, State, and local laws and regulations applicable to the premises, and to the erection or maintenance of signs or advertising displays, including the regulations for the protection of game birds and game animals, and shall keep the premises in a neat, orderly, and sanitary condition.

4. The use or occupancy of the land under this permit shall commence within months from the date hereof and shall be exercised at least days each year.

5. The permittee shall take all reasonable precautions to prevent and suppress forest, brush, and grass fires, and to

6. Authorized representatives of the Department of the Interior and other Federal agencies, and game wardens shall at all times have the right to enter the premises on official business.

7. The permittee shall not enclose roads or trails commonly in public use.

8. The permittee shall pay the United States for any damage to its property resulting from this use.

9. The permittee shall immediately notify the authorized officer of a change of address.

10. This permit is subject to all of the applicable provisions of the regulations (43 CFR, Subpart 2236) which are made a part hereof.

11. The permittee agrees to have the serial number of this permit marked or painted on each advertising display erected or maintained under the authority of such permit.

12. The permittee shall not cut any timber on the lands without prior permission of the authorized officer.

13. This permit is subject to the provisions of Executive Order No. 10355 of May 6, 1961, as amended, which prohibits

lands.

14. Special Conditions:

obtained from the signing officer.

(Authorized Officer)

(Date) (Title)

INSTRUCTIONS

1. This application may be submitted to any local office of the Bureau of Land Management having jurisdiction over the lands. It must be submitted in *duplicate*.

2. An application by a partnership or association must be accompanied by a statement by each member that he is a citizen of the United States or has filed a declaration to become a citizen. An application by a corporation must be accompanied by a statement showing that the corporation is authorized to hold Land in the State in which the land is located and that the person making the application is authorized to act for the corporation.

governmental agency. Checks must be made payable to the Bureau of Land Management.

4. If this application is for permission to erect an advertising display or sign, the applicant must submit an accurate and fully descriptive diagram, sketch, or photograph (at least 3" x 5") of the sign or display. The diagram should show the dimensions, type of construction, and color, the advertising material to be included, the duration of the application, if any, and the proximity of the sign or display to the land; and 2) a photograph (at least 3" x 5") of the site on which the sign or display is to be erected.

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CHRONOLOGY

FEDERAL TASK FORCE ON ALASKAN OIL DEVELOPMENT

April 1969 through February 1970

1969

April

18 —North Slope Task Force established within the Department of the Interior by Secretary.

29 —Meeting of Task Force Working Group under Assistant Secretary, FWP&MR.

May

2 —Meeting of Interior Task Force with Humble, BP, and ARCO representatives.

8 —Meeting of Interior Task Force to brief Washington Conservation Society.

9 —Under Secretary Train departs on five-day inspection trip of pipeline route and North Slope.
—President Nixon expands Task Force into an All-Government Group.

22 —Meeting with Pipeline Conservation/Industry "Ad Hoc" Committee.
—Full meeting of Alaska Field Committee in Anchorage.

June

5 —First meeting Federal Task Force on Alaskan Oil Development.

10 —Set of 79 questions addressed to Trans Alaska Pipeline System.

11 —Application received from TAPS for 800-mile right-of-way from Prudhoe Bay to Valdez.

17 —Second Federal Task Force meeting.

19 —DOT report on Valdez received.

20 —TAPS submits answers to 79 questions.

23 —Telegram sent to Alaska Native associations requesting their views on pipeline.

27 —Secretary Hickel responds to TAPS that application will be granted when several conditions reflecting environmental, legal, procedural and native interest concerns are met.

29 —Interior Task Force assesses TAPS' 'state of technological readiness.'

July

1 —Third Task Force meeting.
—Alaska Field Group starts first draft of stipulations. State of Alaska and other Federal offices participating.

7 —Departmental library completes first bibliography of North Slope topics.

8 —Working Group meeting with TAPS.

17 —Conservation/Industry "Ad Hoc" Committee meets—NSOB.

18 —Alaska Field Group submits first draft of stipulations for Interior Task Force to revise.
—Under Secretary meets with TAPS management committee.

22 —TAPS request freeze modification for 53-mile Livengood-Yukon River road.
(Interior Task Force meeting continuously in this period on the TAPS stipulations.)

29 —First edition of stipulations finished and bound.

31 —USGS Professional Paper #678 "Permafrost and Related Engineering Problems in Alaska" published.

August

5 —Meeting with Alaska Natives regarding pipeline application.

6 —Meeting with Governor Miller to discuss stipulations.

12 —Fourth Task Force meeting.

13 —Freeze lifted for Livengood-Yukon River Road.
(Interior Task Force continues work on 2nd draft of stipulations—Alaska Field Group examining proposed route of pipeline.)

22 —Preliminary Report of Lachenbruch Study is received.

24-27 —Alaska Science Conference on Petroleum Development in the Arctic.

29-30 —Departmental hearings in Fairbanks, Alaska.

30 —Industry-Interior permafrost working group set up under Geological Survey.

31 —"August edition" of stipulations completed.

September

9 —Task Force Supplementary request sent to Congress.

10 —September $900 million North Slope lease sale.

11 —Fifth Task Force meeting.

15 —Preliminary Report to the President on the Task Force completed, and sent to White House.
(Final Interior effort on third draft of stipulations.)

29 —Third draft—pipeline stipulations completed and signed by Secretary.

30 —Letters to Senate and House Interior Committees re: Freeze lift for pipeline.

October

8 —TAPS briefs House Interior Committee on pipeline.

9 —Briefing to Conservationist "Ad Hoc" Committee on pipeline.

16 —Under Secretary testifies before Senate Interior Committee hearing on TAPS.

17 —"Pipeline Coordinator" hired by BLM, Anchorage.

21 —Under Secretary testifies before House Interior Committee hearings on TAPS.

24 —Department receives set of questions from Senate Interior Committee.

28 —Under Secretary testifies before House Interior Committee on TAPS.

31 —Under Secretary testifies before Dingell's Subcommittee on Fisheries and Wildlife Conservation.
—Interior Task Force meeting re: progress on pipeline.

November

12 —Under Secretary testifies before House Interior Committee on TAPS.

18 —TAPS management committee meets with Secretary Hickel.

20 —Answers to 40 questions transmitted to Senate Interior Committee.

26 —Under Secretary testifies before House Interior Committee on pipeline.

December

3 —Senate Appropriation hearings on TAPS financing.

4 —House Appropriation hearing on TAPS financing.

9 —Letter to Mrs. Hansen indicating that Department will charge TAPS for "extraordinary costs".

11 —Senate Interior Committee indicates no objection to freeze lift for pipeline.

16 —House Interior Committee indicates no objection to freeze lift for pipeline.

23 —Interior Task Force meeting to discuss future operations.

24 —Under Secretary prepares Interior "Status Report" on pipeline.

26 —BLM receives $1,250,000 for pipeline inspection. Interior Task Force receives $2,155,000 overall.

1970

January

5 —Conservation "Round-table" presentation by Under Secretary on pipeline.

6 —Sixth meeting—Federal Task Force.

7 —Freeze lifted by Secretary Hickel for pipeline right-of-way.

12 —Geological Circular No. 632, "Some Estimates of the Thermal Effects of a Heated Pipeline in Permafrost", published.
—Land-use Rules Review Committee established within Task Force.

20 —Special Land Use Permit filed by TAPS for road from Yukon to North Slope.

22 —Task Force meeting with Corps of Engineers and CRREL, re: arctic pipeline construction.

23 —Work Group meeting to discuss Arctic National Wildlife Refuge.

26 —Land-use Rules Review Committee established with Task Force by Under Secretary.

February

2 —Second meeting with Corps of Engineers on permafrost technology.

6 —Task Force Land-use Rules Review Committee meeting.
—Interior Task Force meeting to introduce Messrs. Silcock and Turner.

9 —Bob Ebel, OOG, briefs Task Force on Soviet pipeline technology; together with film.

12 —Task Force meeting to establish "extraordinary costs" to be assessed to TAPS.

19 —Senate Appropriation subcommittee hearings—BLM TAPS inspection funds $2,000,000.

20 —House Appropriation subcommittee hearings—BLM TAPS inspection funds $2,000,000.
—Technical Advisory Board established within the Task Force to include CRREL.

25 —BSF&W/BCF joint study on environmental impact of oil development on the North Slope in final draft.
—Conservationist "Ad Hoc" Committee briefed on pipeline progress.

26 —Task Force Rules Review Committee meeting.

27 —Review of stipulations with suggested alterations received from BLM, Anchorage.
—Council on Environmental Quality briefed on pipeline.

Applications For Pipeline Right-of-way And Ancillary Land Uses—Prudhoe Bay To Valdez, Alaska
Application By State of Alaska For Right-of-way For Highway

STATEMENT OF REASONS FOR APPROVAL

Department Procedures

After the discovery of oil on the North Slope of Alaska, the President established the Federal Task Force on Alaskan Oil Development, composed of representatives of various bureaus of the Department of the Interior and other Federal agencies, to consider the ramifications of the discovery.

An application for an oil pipeline right-of-way from the North Slope to Valdez, Alaska, was filed in June 1969 by three oil companies. The application has since been amended. At present, the applicants are Amerada Hess Corporation, ARCO Pipeline Company, Humble Pipeline Company, Mobil Pipeline Company, Phillips Petroleum Company, Sohio Pipeline Company and Union Oil Company of California. Their agent is Alyeska Pipeline Service Company. These companies are jointly and severally referred to hereinafter as "the applicants." The trans-Alaska pipeline system which the applicants propose to construct is referred to hereinafter as "the Alyeska proposal."[1] Under the auspices of the Task Force and the Department of the Interior, many investigations have been conducted and studied, with the result that the technical feasibility of the pipeline is now established. After many months of study, the Task Force developed Stipulations to be included in the terms and conditions of any right-of-way permit which the Department may grant for the trans-Alaska pipeline.

[1] The State of Alaska proposes to construct a State highway from the Yukon River to the North Slope. This proposal is referred to hereinafter as "the State proposal." Where both proposals are jointly discussed, they are referred to as "the proposals."

In August 1969, the Department conducted a two-day public hearing at Fairbanks to acquaint the public with the nature of the pipeline and to seek the public's views concerning it.

A Draft Environmental Impact Statement on the proposals, prepared by the Department, was made public on January 15, 1971. Copies of the Draft Statement were sent to appropriate Federal agencies [2] for review and comment. Public hearings on the Draft Statement were held at Washington, D.C., on February 16-18, 1971, and Anchorage, Alaska, on February 24-March 1, 1971. At the hearings, oral testimony was received from 297 individuals. The hearing record was held open until March 22, 1971, during which time additional testimony was received.[3] The written testimony entered into the record represented the views of 2,731 additional individuals and groups. After the hearing record was closed, an estimated 30,000 written communications concerning the proposals were received by the Bureau of Land Management.

Comments on the Draft Statement were received from the Office of Emergency Preparedness, the Federal Power Commission, the Department of Defense, the Department of Agriculture, the Environmental Protection Agency, the Department of Transportation, the Department of Commerce, and the Department of Health, Education and Welfare. The information obtained from the public and the comments of the agencies were thoroughly reviewed and considered in the preparation of the Final Environmental Impact Statement.

[2] Dept. of Agriculture; Dept. of Defense; Dept. of Transportation; Dept. of Commerce; Dept. of Health, Education and Welfare; Office of Science and Technology; Office of Management and Budget; Office of Emergency Preparedness; Council on Environmental Quality; Environmental Protection Agency.

[3] The testimony and exhibits fill 37 volumes totaling 10,074 pages.

To prepare the Final Environmental Impact Statement, the Department utilized various bureaus within the Department, including the bureaus of Land Management, Indian Affairs, Sport Fisheries and Wildlife, and Outdoor Recreation, the National Park Service, the Office of Oil and Gas and the Geological Survey. Other agencies involved were: Department of Commerce, Department of Transportation, Department of Defense, Environmental Protection Agency, Water Resources Council, Corps of Engineers, Federal Power Commission, Office of Emergency Preparedness, Atomic Energy Commission, Council on Environmental Quality.

In preparing the Final Statement, the Department considered the information obtained through the public hearings and the comments received from the public and Federal agencies with respect to the Draft Statement. To supplement this, the Department sought additional information from the State of Alaska and the Canadian Government, and also contracted with private consultants [4] for data on economic and energy supply aspects of pipeline development and on the Alaska Natives. Among the comments and reports received were those of the State of Alaska, the Alyeska Pipeline Service Company, the Canadian Government, the Council of Economic Advisers, the Office of Emergency Preparedness, the Department of Defense, the Coast Guard, the Department of Commerce and the Department of the Treasury. The following Interior agencies also furnished data: Bureau of Mines, Geological Survey, Office of Economic Analysis and the Office of Oil and Gas. These studies are included in the Department's report

[4] The private consultants are: Education Systems Resources Corporation with a study of the impact of proposed trans-Alaska pipeline on Alaska Native population; Mr. R. L. Gordon, of the Pennsylvania State University, who studied the future demand for petroleum in the United States; and the University of Alaska which prepared the study on the economic impact of the trans-Alaska pipeline on the economy of Alaska.

entitled, "An economic analysis of the economic and security aspects of the trans-Alaska pipeline" which was published with the Final Environmental Impact Statement. These materials were carefully reviewed within the Department of the Interior.

Received at this time from the applicants were a project description of the marine transport system, and supplements thereto. These were reviewed with utmost care by the Technical Advisory Board (an adjunct of the Federal Task Force on Alaskan Oil Development) and by personnel of the Department. These data and the Department's review of them were taken into consideration in the preparation of the Final Statement.

The Final Environmental Impact Statement, comprising six volumes, was released to the public on March 20, 1972, together with a three-volume analysis of the economic and security aspects of the Alyeska proposal. The Final Statement includes a summary and analysis of the comments which were received by the Department concerning the Draft Environmental Impact Statement. The Final Statement was also made available to the Council on Environmental Quality and other Government agencies. The Department announced at that time that it would take no action for at least forty-five days. This waiting period exceeds that set forth in the guidelines of the Council on Environmental Quality, namely thirty days. Since more than thirty days has elapsed since the Final Statement was made available to the Council and the public, the Department has complied with the guidelines of the Council on Environmental Quality in this regard and administrative action may now be taken.

Certain additional comments have been received by the Department since the publication of the Final Environmental Impact Statement. Among these are: (1) "Comments on the Environmental Impact Statement for Trans-Alaska Pipeline," compiled by the Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth, and submitted through their attorneys, and (2) "Interim Report No. 1, Towards an Environmental Impact Assessment of a Gas Pipeline from Prudhoe Bay, Alaska, to Alberta," submitted by Environmental Protection Board, sponsored by Gas Arctic Systems. All comments received have been reviewed and considered in reaching a decision on the proposals.

In determining whether to approve the Alyeska proposal and the State proposal, the Secretary of the Interior has thoroughly considered the essential information contained in the following materials upon which his determination is premised:

1. Information received from the applicants, including the project description and the description of their proposed marine transport system, and supplements thereto.
2. Studies and analyses submitted to, or prepared for or by, the Department in regard to the proposals.
3. Materials and conferences relating to national policies of the United States; consultations with other Federal officials, officials of the State of Alaska, and officials of the Government of Canada.
4. The information adduced at the public hearings which were held in Alaska in August 1969, including subsequent comments thereon.
5. The Draft Environmental Impact Statement prepared by the Department.
6. The information adduced at the public hearings on the Draft Statement, including materials submitted thereafter for the record.
7. Comments on the Draft Statement received by the Department from the public, Federal and State

agencies, and other sources within and without the Department.

8. The Final Environmental Impact Statement.

9. The Analysis of the Economic and Security Aspects of the Trans-Alaska Pipeline which accompanied the Final Statement.

10. Comments on the Final Statement and the Economic and Security Analysis received from all sources.

The Alyeska proposal is a highly complex project. In addition to the line of pipe itself and its appurtenant structures (such as pump stations, block and check valves, storage and surge tanks, gathering lines, corrosion protection devices, monitoring systems, etc.), additional facilities are involved. Principal among these are the terminal facilities at Valdez, a network of temporary access roads, airfields, materials sites, communication sites, construction camps, a gas pipeline to supply fuel to power several of the pump stations, harbor facilities at Valdez, and a marine transport system from Valdez to the West Coast of the United States.

Some of these facilities will be located on lands which are not within the jurisdiction of the Department of the Interior, and therefore it will be necessary for the applicants to obtain permits from other governmental agencies, both State and Federal. However, the Bureau of Land Management of the Department of the Interior has administrative jurisdiction over most of the Federally owned lands which will be traversed or otherwise affected by the pipeline and its related facilities.

Pending Applications

The following applications filed by the applicants are now before the Department: (1) application for 54-foot wide oil pipeline right-of-way from Prudhoe Bay on the North Slope of Alaska to Valdez, Alaska; (2) application for special land-use permits for additional widths of land contiguous to the pipeline right-of-way for temporary construction purposes; (3) application for rights-of-way for pumping stations; and (4) applications for rights-of-way for communications sites.

There is also presently before the Department an application by the State of Alaska for a right-of-way for a State highway from the Yukon River to Prudhoe Bay. The State has also submitted applications for gravel and other construction materials to construct the highway.

The State of Alaska, in cooperation with the applicants, has constructed a public highway from Livengood to the Yukon River which will be used by the applicants during construction and maintenance of the pipeline. This highway will be joined to the proposed State highway by a bridge across the Yukon River. The applicants will use the highway in connection with the construction and maintenance of the highway.

Up to the present time, the Department has authorized the applicants to use public lands for various field explorations (such as soils investigations and surveying), and for temporary communications sites, campsites, and temporary airstrips (located on existing roads or campsites) supportative of such explorations.

The Department of Agriculture has issued the applicants a permit for construction of terminal facilities at Valdez within the boundaries of the Chugach National Forest. The permit authorizes construction activities in three stages, only the first of which, involving surveying and clearing, has been completed. The State of Alaska has filed a selection pursuant to the community grant made by section 6(a) of the Alaska Statehood Act for the terminal area.

If the application for the pipeline right-of-way permit and other pending applications are granted, additional

authorizations will be necessary for additional construction camps, material sites, access roads, spoil disposal areas, intermediate pipe storage sites, and a gas pipeline to supply fuel to power several of the pump stations.

In addition, the applicants have filed applications with the Department of the Army for rights-of-way across military installations, and applications with the Corps of Engineers for permits for facilities at the Valdez terminal site. The applicants must also apply to the Corps of Engineers for permits for burial of the pipeline under navigable streams and for other operations involving navigable waters, and to the Coast Guard for permits for crossings of navigable streams by bridges.

Also before the Department are applications filed by Bud Brown Enterprises, Incorporated, for a pipeline right-of-way permit, a permit to construct an aerial tramway, a right-of-way permit for telephone, telegraph and power transmission lines, and a special land-use permit for 100-foot wide strips of land on both sides of the pipeline right-of-way. The Bud Brown proposals are unacceptable. The Final Environmental Impact Statement, Volume 5, pp. 226-7, 230 discusses the technical difficulties associated with the suspended pipeline system which this applicant proposes to use. A suspended pipeline system would be more vulnerable to earthquakes, landslides and floods than would be buried pipeline. The proposal is technically inferior to a buried pipeline with occasional above-ground construction in permafrost areas. In addition, the applicant, Bud Brown Enterprises, Inc., has not submitted, or given indication that it is likely to submit, all the documents required by the Departmental regulations. Nor has it demonstrated, or given indication that it is likely to demonstrate, that it is qualified and able to construct the oil pipeline for which it seeks a right-of-way. For each reason set forth in this paragraph, it is determined that all of said applications of Bud Brown Enterprises, Inc., should be rejected.

Legal Authorities

The following statutes and regulations authorize the Secretary of the Interior, in his discretion, to grant the applications for the proposals: right-of-way permit for oil pipeline, 30 U.S.C. sec. 185, 43 CFR, Parts 2800 and 2880; right-of-way permits for communications sites, 43 U.S.C. sec. 961, 43 CFR, Parts 2800 and 2860 special land-use permits, 43 CFR, Part 2920 and statutes cited therein; rights-of-way for public highways, 43 U.S.C. sec. 932, 43 CFR, Part 2800 and Subpart 2822; and mineral materials disposals, 30 U.S.C. secs. 601, 602, 43 CFR, Group 3600.

National Policies

The National Environmental Policy Act sets out policies and goals on environmental quality, among which is, "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment. . . ." Section 101(b) of the Act requires that the means used to implement the Act are to be "consistent with other essential considerations of national policy. . . ." Thus, the national policies set forth in the Mining and Minerals Policy Act of 1970, 84 Stat. 1876, 30 U.S.C. 21a., must also be considered. Likewise, the national policy of the President must also be considered. The policy has been enunciated in the President's June 4, 1971, Message on Energy Policy, in which he stated that a sufficient supply of clean energy is essential if we are to sustain healthy economic growth and improve the quality of our national life. The President reemphasized that policy in his Environmental Message to Congress on February 8, 1972.

On February 18, 1971, the Director of the Office of Emergency Preparedness, commenting on the Draft Environmental Impact Statement for the Trans-Alaska pipeline, stated that "it is particularly important to stress the need for early availability of Alaskan oil to meet the petroleum needs of the West Coast (District V)."

The Economic Report of the President, which was transmitted to Congress in January, 1972, discusses the economic costs of pipeline development and places the decisional process on the question in its proper perspective. The Report, at pages 122-123, states:

> "The pending decision about issuing a right-of-way permit to the Trans-Alaska Pipeline illustrates the considerations involved in government allocation of environmental resources. . . .
>
> "Development of the 10-billion-barrel field and transportation of the oil to the West Coast would save the nation $15 billion of $17 billion during the expected 20-year life of the field. These costs must of course be weighted with other considerations mentioned above in arriving at an ultimate decision."

The Secretary of the Interior, therefore, must consider these policies, as well as other national policies, including those regarding economics and national security, together with the policies enunciated in the National Environmental Policy Act, in making a decision regarding the proposals.

National Environmental Policy Act Compliance

The procedural requirements of the National Environmental Policy Act have been met.

Section 102(2)(A) of the Act directs that, to the fullest extent possible, all agencies of the Federal Government shall utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment. Since its inception, the Department's evaluation of the proposals has been based on the approach prescribed by the statute. The Final Environmental Impact Statement, Volume 6, pp. 1-7, sets out the various Federal agencies that contributed to the decisional process.

Section 102(2)(B) of the Act directs that, to the fullest extent possible, all agencies of the Federal Government

shall identify and develop methods and procedures, in consultation with the Council on Environmental Quality, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations. The requirement deals with each agency's general procedures. The Department has complied with it by adopting general internal procedures for compliance with the Act. In addition, for the purposes of preparing the Final Environmental Impact Statement in the present case, specific procedures were devised to insure compliance. See Volume 6 of the Final Environmental Impact Statement.

Section 102(2)(C) of the Act directs that, to the fullest extent possible, all agencies of the Federal Government shall include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(1) the environmental impact of the proposed action,

(2) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(3) alternatives to the proposed action,

(4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

In its role as lead agency, the Department has prepared the requisite detailed statement with respect to the Alyeska proposal and the State proposal, and all Federal actions that will be required in connection therewith. That statement is the six volume study entitled "Final Environmental

Impact Statement—Proposed Trans-Alaska Pipeline," prepared by a special interagency task force for the Federal Task Force on Alaskan Oil Development. The Statement specifically and comprehensively treats each of the five subjects required to be in such a statement, as well as all matters required to be treated by the guidelines of the Council on Environmental Quality and the Department.

Section 102(2)(C) of the Act further directs that the responsible Federal official of an agency preparing an environmental statement required by the subsection of the act shall, prior to making the detailed statement, consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, are required to be made available to the President, the Council on Environmental Quality and to the public as provided by U.S.C. sec. 552 and shall accompany the proposal through the existing agency review processes.

Prior to promulgating the Draft Statement and prior to promulgating the Final Statement, the Secretary consulted with and obtained the comments of all Federal agencies having jurisdiction by law or special expertise with respect to any environmental impact involved. A draft of the Final Statement was commented upon by, and consultations were had with, the Office of Emergency Preparedness, the Federal Power Commission, the Environmental Protection Agency, the National Park Service, and the Departments of Defense, Agriculture, Transportation, Commerce, and Health, Education and Welfare. Volume 6 of the Final Statement contains a full listing of participating Federal agencies.

Copies of the Final Statement, which includes the comments of the appropriate Federal, State and local agencies,

were made available to the Council on Environmental Quality and to the public on March 20, 1972. The Final Statement was submitted to the President on the same date.

The Department issued a press release on March 20, 1972, to inform the public that the statement was available and where it might be reviewed. A notice to the same effect was inserted in the *Federal Register*. Copies of the statement were made available for public inspection in various locations at Washington, D.C.; at Anchorage, Fairbanks and Juneau, Alaska; at Portland, Oregon; at Seattle, Washington; and at Los Angeles and San Francisco, California. In addition, the public was informed that copies of the statement could be obtained from the National Technical Information Service of the U.S. Department of Commerce. Accordingly, the requirements of 5 U.S.C. sec. 552 have been, and are being, fully complied with.

Because of the magnitude and importance of the project, special review procedures were established within the Department. This was necessary because of the involvement of almost every bureau of the Department and the involvement of a multitude of other agencies, both Federal and State. The Final Statement and comments and views of appropriate Federal, State and local agencies have accompanied the proposals through all stages of this review process.

Section 102(2)(D) of the Act directs that, to the fullest extent possible, all agencies of the Federal Government shall study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. The Department has studied, developed and described appropriate alternatives, including nonuse of the resources involved.

Section 102(2)(E) of the Act directs that, to the fullest extent possible, all agencies of the Federal Government shall recognize the world-wide and long-range character of

environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment. In considering whether to grant the requested permits, the Department has taken into full account the international aspects of the matter. The Final Environmental Impact Statement and the accompanying documents consider the international environmental impacts and the advantages and disadvantages of a Canadian route. Discussions have been had with the Government of Canada on these matters.

Section 102(2)(F) of the Act directs that, to the fullest extent possible, all agencies of the Federal Government shall make available to States, countries, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment. This provision is general and has no direct relationship to this decision on the proposals. However, the Department of the Interior has made available to the public all of the studies performed by it and other Federal agencies which relate to the proposed project.

Section 102(2)(G) of the Act directs that, to the fullest extent possible, all agencies of the Federal Government shall initiate and utilize ecological information in the planning and development of resource-oriented projects. The Department has initiated and utilized ecological information throughout its involvement. Thus, the Department has prepared environmental Stipulations to govern the construction, operation, and termination of the proposals. Numerous ecological studies have been initiated and used by the Department and the Department has caused the applicant also to prepare and utilize ecological data throughout its planning and development of the project.

Section 102(2)(H) of the Act directs that, to the fullest extent possible, all agencies of the Federal Government

shall assist the Council on Environmental Quality. The Department has furnished materials relating to this matter to the Council and has kept the Council fully informed. All data required by law or regulation to be supplied to the Council or requested by the Council have been supplied.

Major Considerations Involved in the Determination of the Proposal

A. *United States Energy and Crude Oil Posture*

Crude oil demand in the United States most probably will be:

Year	Million Barrels per Day
1975	18
1980	22
1985	27

United States domestic crude oil production most probably will be:

Year	Million Barrels per Day
1975	10.0
1980	10.4
1985	10.4

Without regard to North Slope oil, a domestic crude oil deficit (the difference between demand and domestic supply) will exist and it most probably will be:

Year	Million Barrels per Day
1975	8.0
1980	11.6
1985	16.6

Western Hemisphere states (including Canada, Venezuela, Ecuador and Peru) will supply the United States all

the crude oil they are able, and such most probably will amount to:

Year	Million Barrels per Day
1975	3.62
1980	3.9
1985	4.57

Therefore, considering domestic crude production and probably Western Hemisphere imports, the United States will still have a crude oil deficit, and it most probably will amount to:

Year	Million Barrels per Day
1975	4.38
1980	7.7
1985	12.03

Whether such deficits can be reduced by increases in domestic natural or synthetic crude oil production, increased production and substitution of other sources of energy, or reduction in demand for energy or crude oil has been analyzed and thoroughly considered. It is concluded that it is unlikely that such deficits can be reduced significantly in any such manner. Therefore, for the foreseeable future, imports of oil from non-Western Hemisphere sources (primarily the Eastern Hemisphere) and North Slope crude oil are the only sources available to meet the deficit between demand and United States production (without North Slope oil) plus other Western Hemisphere availability.

The crude oil that would be available if the proposed trans-Alaska pipeline system were authorized at this time most probably would be 0.6 million barrels per day in 1975, 1.2 million barrels per day in 1980, and 1.6 to 2.0 million barrels per day in 1985.

B. *National Security Aspects*

Development of North Slope crude oil will result in the avoidance, to a significant degree, in increases in United States importation of Eastern Hemisphere oil. The avoidance of such increased dependency on Eastern Hemisphere imports is in the national interest, and development of North Slope oil will substantially lessen the deleterious consequences of such imports.

The Secretaries of State and Defense and the Director of the Office of Emergency Preparedness have found that there is a clear national security need for the development of North Slope oil, since such oil provides the potential to keep United States dependence on insecure foreign oil within reasonable bounds.

The Secretary of State has also concluded that the security needs of the United States, which require that Alaskan oil be brought to the lower 48 States by the most expeditious means, can best be served by quick approval of the line through Alaska.

The Director of the Office of Emergency Preparedness has also found that unless 500,000 barrels per day of oil can be provided from the North Slope, imports from Eastern Hemisphere sources will increase to about one-third of demand in Petroleum Administration District V (the West Coast) by 1975 and 46 percent by 1980. This, the Director found, is unacceptable in terms of national security.

The Secretary of Defense has also concluded that from an energy standpoint, the next ten to fifteen years will find the United States heavily and necessarily dependent on oil from sources which are politically insecure in peacetime and militarily insecure in event of hostilities; at best, during those years that dependence will incur considerable risk for the nation's economy, the well-being of the populace, and the national defense. The Secretary has also concluded that there is no district preference ascertainable

currently from a national security standpoint for any particular mode.

The General Counsel of the Treasury, on behalf of the Secretary of the Treasury, has concluded that unless the United States can proceed expeditiously with obtaining Alaskan oil to help satisfy a large part of our growing energy needs from domestic sources with as close to zero damage to the environment as is humanly possible, the whole structure of our domestic energy program will be in jeopardy; the resultant costs to our country, both in energy security and in our balance of payments, would be imprudently high and must be avoided.

The Secretary of Commerce has found that North Slope oil is an important and necessary energy reserve which is vital to the United States' continued economic security. The working paper transmitted by the Secretary concludes that sufficient foreign petroleum sources do exist to meet our future needs; however, prices, foreign political contingencies and national security considerations make heavy reliance on these sources undesirable. The paper also concludes that dependence on foreign supply involves the risk of major price increases and other detrimental occurrences; purchase of oil from foreign sources involves negotiation with countries where the political climate may be unstable. Reliance on foreign sources for substantial amounts of our most important energy source could place the United States in a vulnerable position if the interests of the countries involved conflict with those of the United States.

It is concluded that the importation of oil from Eastern Hemisphere, as well as other sources, has significant detrimental consequences for the United States: (1) It results in a resource cost to the nation substantially and significantly greater than that resulting from the domestic production of the same amount of oil. (2) Almost the entire delivery price of imported oil is an outflow for balance of payments purposes; such is a cost to the nation which, because of the present balance of payments posture, should be avoided. In this regard, the impact on the balance of payments of the development of North Slope oil would be positive; however, the size of the positive impact is uncertain.

Other factors also lead to the conclusion that North Slope oil should be developed and transported as rapidly as possible. The State of Alaska will receive substantial royalty and tax revenues from North Slope oil, estimated at $300 million per year at full pipeline capacity. Under the terms of the Alaska Native Claims Settlement Act, 16 percent of the State's royalty revenues will be paid to Alaskan Natives until the Natives have received a total of $500 million from such source. Any postponement of such revenues will have substantial adverse consequences for the State and the Alaskan Natives. American industry has invested approximately $900 million in North Slope oil and gas leases; failure to develop such reserves will result in the loss of such investment, and postponement of development will cause industry to incur costs inherent in the loss of use of such investment. Further, from a national economic efficiency standpoint, North Slope oil can be found, produced and delivered to the continental United States at substantially less cost than oil imported from the Eastern Hemisphere.

Based upon the findings and conclusions of the aforementioned Federal officials and upon all the material before the Department, it is concluded that it is in the national interest for the North Slope oil to be developed and transported to market, that such should be accomplished as rapidly as practicable, and that the importation of oil in lieu of such development is not in the national interest.

C. *Choice of Market for North Slope Oil*

The Director of the Office of Emergency Preparedness has found that there is a national security requirement that

"early availability of North Slope oil is crucial to the national security—primarily in the crude-deficit District V, where the availability of imported low sulfur crude oil is threatened by competition with Japanese requirements for petroleum, but also in Districts I-IV, where increased dependence on Eastern Hemisphere oil can be partially offset by diversion of Canadian oil from the West Coast." As noted above, he has also found that without North Slope oil, Petroleum Administration District V will be dependent on Eastern Hemisphere imports through at least 1980 to a degree that is unacceptable in terms of national security.

The Gulf Coast Region (Petroleum Administration District III) is in the most secure position for domestic oil supply by reason of its extensive geologic reserves. The Eastern Seaboard Region (Petroleum Administration District I) is in the least secure position because it lacks indigenous reserves. The Midwestern States Region (Petroleum Administration District II) derives its current supply by secure overland routes from its own indigenous reserves, augmented by secure overland supplies from District III and Canada. The Canadian pipeline import is offset by an essentially equivalent supply delivered by tanker to Portland, Maine, and thence by pipeline to Montreal. The Rocky Mountain States Region (Petroleum Administration District IV) has an indigenous supply but a relatively low population density. In addition, it has vast coal reserves. The Pacific Coast States Region (Petroleum Administration District V) has an indigenous supply in southern California, augmented principally by tanker imports, in part from foreign sources and in part by United States tankers from Cook Inlet, Alaska. The West Coast deficit, exclusive of Canadian and Alaskan sources, is projected to be more than 1,000,000 barrels per day by 1975, approximately 2,000,000 barrels per day in 1980, and to increase progressively in subsequent years as demand increases. Delivery of North Slope oil to the West Coast performed in United States tankers would displace foreign oil and decrease our reliance on foreign tankers to West Coast ports. This will strengthen the U.S. maritime industry. Delivery of North Slope oil to District V will also provide more flexibility in the total United States oil delivery system.

Based on the foregoing, it is concluded that the District V market is the preferable primary market for North Slope oil.

D. *The Proposal for the Trans-Alaska Pipeline*

1. *Feasibility*

The proposal for the trans-Alaska pipeline is set forth in the Project Description submitted to the Department by the Alyeska Pipeline Service Company and thereafter supplemented. Based on all the information before the Department, it is concluded that the proposal is technically feasible and that the pipeline system and all its components can be built by the applicants to conform to the Project Description and to meet all requirements imposed by law and those that would be imposed by the Department Stipulations. Certain components of, or devices to be used in connection with, the proposed system have not yet been developed or designed, and whether certain proposed methods of construction will meet certain local conditions has not yet been proven. Development and design of such components and devices and tests proving the efficacy of such construction methods, or satisfactory substitutes therefor, are within the capability of the present state of technology. The lack of such developments, designs and tests is not significant for purposes of making a determination with respect to the proposal, and there is presently before the Department sufficient information in this regard upon which a rational and informed decision can be made.

2. *Timing and Capacity*

From the date rights-of-way for the proposed trans-Alaska pipeline are granted, the line can be operating at a

capacity of 600,000 barrels per day throughput within three years, at a capacity of 1,200,000 barrels per day within six years, and at a capacity of at least 1,600,000 barrels per day within ten years.

3. *Economic and Social Consequences*

The impact on the State of Alaska of development of North Slope oil resources and construction of a trans-Alaska pipeline system for transportation of that oil to market will be mixed. Short-run increases in employment will be beneficial; reduction in employment at the end of construction, and a variety of dislocations, will tend to offset those benefits to some degree. Long-run benefits will result largely from the flow of royalty and tax revenues to the State; the size and pattern of those benefits will be determined by future State action.

Trans-Alaska pipeline construction: (1) will cause a sharp rise in the level of civilian employment and State personal income in Alaska, followed after three years by a decline, strongly concentrated in specific sectors and regions; (2) probably will not reduce unemployment in Alaska; (3) will not, in a major way, reduce the existing barriers to Native employment; and (4) will probably increase prices and cost of living in Alaska. After the period of construction of the trans-Alaska pipeline, the Alaskan economy may experience a significant downward readjustment.

The State of Alaska will receive very substantial revenues from the development of North Slope oil. The long-run impacts of development of North Slope oil on the State of Alaska are dependent upon the policies and actions of the State and its spending decisions with respect to the State revenue.

The Alyeska proposal will use American-built ships for its marine segment to United States ports. Construction of

the 33 new tankers required in the United States shipyards will generate substantial employment and income.

The threat of oil pollution to the Northern Pacific commercial marine fisheries that might be affected by either infrequent large oil spills or chronic low-level pollution is discussed in Volume 4 of the Final Environmental Impact Statement. Such threats, the probabilities and extent of damage resulting therefrom, and the consequences of such damage have been considered.

4. *Environmental Consequences*

Construction, operation, maintenance and the ultimate termination of the proposed trans-Alaska pipeline and construction and use of the proposed State highway will have substantial environmental consequences. Many are certain to occur and others are threatened. Among those certain to occur are: (1) terrain disruption and utilization and some erosion over the pipeline route, at the Valdez terminal and with respect to the State highway in an additional degree from Prudhoe Bay to the Yukon River; (2) commitment of a substantial amount of construction materials; (3) effects on water quality, both surface and groundwater, and air quality; (4) effects on wildlife and fisheries, and their habitat, in varying degrees, both along the route and in Prince William Sound; (5) effects on recreational and aesthetic values; (6) effects on communities and on the Alaskan Natives; (7) diminution of wilderness characteristics along the route and beyond; and (8) effects on destination port waters.

In addition, in connection with operation of the line, there are threatened environmental consequences which might result in oil spills of either large or small size. These include risks to the pipeline because of seismic events, permafrost degradation, slope failure, flooding and seismic risk to the terminal. There are also risks of spills resulting from tanker casualties and oil transfers.

All of the environmental consequences, both certain and threatened, have been thoroughly analyzed and considered. Although some environmental studies are continuing, there is presently before the Department adequate information on which to base a rational and informed determination with respect to the proposals.

Another relevant consideration is the set of environmental and technical Stipulations developed by the Department during its review process. Such Stipulations can and will be rigorously enforced by the Department, and they provide the Department with adequate enforcement procedures. Application and proper enforcement of them will not avoid the environmental consequences of the proposal, but many such consequences can and will be minimized as a result of them. This is particularly true of consequences that would result from the peculiar specifics of the Alyeska proposal. The instances where this would occur are discussed in the Environmental Impact Statement.

Authorization of the trans-Alaska pipeline will result in certain ancillary developments. Primary among these will be development of the Prudhoe Bay oil field, a development that has already begun and that will be the inevitable result of any method of transporting North Slope oil. Similarly, the natural gas present in the Prudhoe Bay field will have to be developed and transported, most probably by pipeline through Canada. Although it is very likely that a second oil line will be required to transport North Slope oil, it is not certain to occur; if it should, it is entirely speculative as to where such a line would be sought to be constructed. If such a line were to be built, it is possible that it would be constructed through Canada. Authorization of the trans-Alaska pipeline will also require the construction of a highway by the State of Alaska from the Yukon River to Prudhoe Bay. The environmental consequences of all ancillary developments, including the above, have been sufficiently analyzed and thoroughly considered.

Upon consideration of the foregoing and all the material before the Department, and weighing the benefits that would result from the Alyeska proposal against the detriments that would be associated therewith, it is concluded that the Alyeska proposal is acceptable.

E. *Alternative Methods of Transporting North Slope Oil*

None of the suggested alternative modes, including railroad, highway, marine tanker systems, and other systems (such as modified pipelines, suspended or elevated pipelines, pipelines combined with other modes, submarine pipelines, airlift systems, and conversion to other energy forms) are viable alternatives to pipeline or pipeline-plus-tanker transportation systems as alternative modes of transporting North Slope oil and gas, due to feasibility and/or environmental considerations.

1. *Alternative surface modes*

Railroad systems from the North Slope (1) to a southern Alaska ice-free port with marine tanker transportation on to market, or (2) via Canada to a northern Montana connection with existing United States rail systems are not viable alternatives to a pipeline system. Although studies with respect to such systems are continuing, it is concluded they are economically infeasible, and lack of precedent for such large volume operations in the Arctic environment makes technical feasibility uncertain. In comparison with pipelines, some lowered environmental threats would be offset by increased terrain disruption and construction material requirements.

The operation of a truck fleet large enough to carry two million barrels of oil per day from the North Slope to a southern Alaska port for transshipment to market or to the north-central United States via a trans-Alaska-Canada route has not been suggested seriously and is not feasible.

2. *Alternative marine transport systems*

Ice-breaking tanker systems from the North Slope to market ports via both the Bering Strait and Northwest Passage routes for oil transportation are not currently feasible and will not be so in the foreseeable future. These systems would entail uncertainties in regard to submarine permafrost conditions, offshore dredging and other terminal construction and maintenance problems, safe navigation, and sea ice conditions. Any Arctic Ocean tanker system would probably incur relatively high associated environmental costs.

Submarine transport systems from the North Slope to market ports are not currently feasible and will not be so in the foreseeable future.

No other oil transport modes are currently feasible or will be so in the future.

3. *Alternative trans-Alaska pipeline routes*

Neither overland nor offshore pipeline systems from the Prudhoe Bay to a Bering Sea port connecting with a marine transport system to market ports are technically feasible at present and are not likely to be so for many years. An overland oil and gas pipeline corridor to Bering Sea port sites is feasible; however, unanswered technical problems associated with offshore tanker terminal construction and operation make the alternative of questionable feasibility. An offshore pipeline from Prudhoe Bay to terminal ports on the Bering Sea is not now, and could not be for some time, feasible because of unsolved technical problems associated with sea bottom permafrost, ice scouring, and problems associated with offshore tanker terminal construction and operation.

The route to Haines-Port Chilkoot is of appreciably greater length, has no significant environmental advantages, and is therefore not a viable alternative.

The route terminating at Redoubt Bay in Cook Inlet would be preferable to any other feasible trans-Alaska

route other than the route to Valdez from an environmental point of view.

Of the possible trans-Alaska routes to ice-free ports, that to the Redoubt Bay area of Cook Inlet, when compared with the route to Valdez, would perhaps incur lower environmental costs in some respects and higher environmental costs in other respects. It is concluded that, on balance, there is no overall significant environmental advantage to the Redoubt Bay alternative. Further, taking into consideration the need for rapid development of North Slope oil, this alternative is less preferable than the Valdez route.

4. *Alternative Canada Pipeline Routes to Edmonton, Canada*

Several proposed pipeline routes from Prudhoe Bay to Edmonton, Canada, have been analyzed and thoroughly considered. Although the level of information that is available concerning these routes is lower than that available for the Alyeska proposal, there is sufficient information concerning the trans-Canada routes before the Department for a decision to be made concerning the proposal and its alternatives.

Overland pipelines through Alaska and Canada and overland pipelines through Alaska to a southern ice-free port together with a tanker transportation system are presently the only feasible and environmentally acceptable means of transporting the North Slope oil to market. Overland pipelines through Alaska and Canada are the only feasible and environmentally acceptable means of transporting the North Slope gas to market.

The pipeline corridor from Prudhoe Bay inland, skirting the south of the Arctic National Wildlife Range, to Fort McPherson and up the Mackenzie Valley to Edmonton is feasible and would entail the least environmental harm of the alternative trans-Alaska-Canada corridors. Alternate corridors along the Arctic Ocean coast and inland, skirting

the Arctic National Wildlife Range, to Fort McPherson and up the Mackenzie Valley to Edmonton are feasible for oil and gas pipelines. A corridor south along the proposed oil pipeline route to Big Delta, Alaska, and from there to Edmonton is also feasible. Pipelines in the alternative coastal and inland corridors leading to the Mackenzie Valley corridor would cause about the same environmental impact, but the coastal corridor would incur less overall impact. The coastal corridor would cross the Arctic National Wildlife Range, however, and the inland corridor is therefore preferable. A pipeline in the Big Delta corridor would cause more impact than a pipeline in the Mackenzie Valley corridor. Although all trans-Canada routes have been analyzed and considered, only the inland Mackenzie Valley corridor to Edmonton route is discussed below and it is referred to as the trans-Alaska-Canada route.

As regards the terrestrial abiotic environment, the trans-Alaska route would have significantly less impact with respect to construction material requirements and their effects; changes in the quality of both surface and ground water; changes in air quality; physical space commitment; and direct and indirect terrain disruption.

As regards the terrestrial biotic environment, the trans-Alaska route would have significantly less impact with respect to vegetation and habitat disruption and would have an approximately equivalent impact with respect to wildlife; the trans-Alaska-Canada route might have significantly less impact with respect to freshwater fisheries, depending primarily on the number of crossings of the MacKenzie River that would be involved.

As regards socioeconomic impacts, the trans-Alaska route would have significantly less impact with respect to disruption of wilderness values, and the trans-Alaska-Canada route would have significantly less impact with respect to effects on recreation, aesthetics, communities and Native culture and subsistance.

The trans-Alaska-Canada route would threaten impact on the marine environment and its associated wildlife and fisheries only through proximity of the origin stations to the Arctic Ocean and through crossing of watersheds that drain directly into the ocean. The trans-Alaska route would have the same impact in addition to the unavoidable impacts of the marine terminal facilities at the port (primarily the impact of discharge of oil from ballast treatment facility and possible discharge at sea of oily ballast and tank cleaning residues) and the impacts imposed by the threat of oil loss in transfer operation at all ports and through tanker casualties.

As regards risks that may threaten terrestrial environmental damage, the trans-Alaska route poses a risk approximately equivalent to that of the trans-Alaska-Canada route with respect to the nature of permafrost degradation, floods, and slope failure, and the trans-Alaska-Canada route poses a lesser risk with respect to seismicity.

Upon analysis, certain conclusions with respect to the environmental consequences, both certain and threatened, of the trans-Alaska route and the trans-Alaska-Canada route result: (1) each would involve significant environmental consequences; (2) neither route is superior in all respects; (3) each route has significant aspects in which it is superior to the other; (4) neither route is clearly preferable; and (5) the environmental consequences of each route, when weighed against the advantages to be derived from the construction of a pipeline, are acceptable.

F. *Further Deferral of Action*

Study by the Department of the problems associated with transportation of North Slope oil began in 1969. In June, 1969, these applicants first filed their application for a right-of-way. Since that time, the Department has been studying and analyzing the proposal, and all aspects thereof, including alternatives thereto, and it has reached no

decision with respect to the proposal or the applications until this time.

The primary advantage of further deferral of a decision with respect to the Alyeska proposal would be to allow the completion of studies in progress, the development of additional information (primarily concerning the trans-Alaska-Canada route), and further development of certain technical aspects of the proposed pipeline system.

There is now available to the Department sufficient data, studies and information with respect to all aspects of the Alyeska and State proposals and their consequences and alternatives, so that an informed and rational judgment with respect to them can be made. Any further deferral of a decision would delay development of the North Slope oil with the attendant adverse consequences which have been discussed above, and the limited advantages of deferral are not significant enough to warrant that delay. Accordingly, further deferral is not appropriate.

G. *Summary and Decision*

After maximum practicable domestic onshore and offshore production and the importation of the maximum amount of crude oil other Western Hemisphere states are able to supply are taken into consideration, the United States, by 1975, will have a deficit in its crude oil demand/supply that will become greater each succeeding year. Relief for that deficit will be obtainable from only two sources: non-Western Hemisphere imports and, in part, North Slope oil. Reliance on Eastern Hemisphere imports to the exclusion of development of a national resource, the North Slope oil, is not in the national interest. To so rely would make the United States unduly dependent on insecure sources of oil, have adverse balance of payments consequences, and result in substantial resource costs to the nation: effects that North Slope oil development would avoid. In addition, such development would provide substantial revenues to the State of Alaska and Alaskan Natives. It is therefore in the national interest that North Slope oil be developed and that such development occur as soon as practicable.

Both the proposed Trans-Alaska pipeline [1] and the trans-Alaska-Canada route [2] which have been discussed would be technically and economically feasible (in fact, they are the two principal alternatives that have such feasibility). Each, in varying degrees, would result in significant adverse environmental consequences, both certain and potential. The environmental consequences that would result from the choice of either route, however, are considered to be acceptable when the advantages resulting from the development of North Slope oil are considered.

Neither the trans-Alaska route nor the trans-Alaska-Canada route is clearly preferable with respect to its environmental consequences.

Construction of the oil pipeline for transporting North Slope oil along the trans-Alaska-Canada route would allow both it and the pipeline for transporting North Slope gas to be constructed in a common corridor. This would result in economies of construction and lesser environmental impacts than if separate corridors were used for each line. The advantages of such a common corridor have been thoroughly considered, and it is concluded that they are outweighed by both the advantages to the national interest resulting from the construction of a trans-Alaska line and the disadvantages to the national interest associated with the trans-Alaska-Canada route.

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[1] The route referred to as trans-Alaska route is the Prudhoe Bay to Port Valdez route. As noted, *supra*, such route would be preferable to the other viable route from Prudhoe Bay to southern Alaska, that running to Redoubt Bay on Cook Inlet.

[2] The route referred to as the trans-Alaska-Canada route herein is the Prudhoe Bay to Edmonton (inland) route. As noted, *supra*, such route is preferable to any other route through Canada.

There are other essential considerations, including several of national policy, which must be taken into account along with the environmental considerations.

Although the Canadian Government has expressed great interest in a trans-Alaska-Canada pipeline and has said it could begin to process an application towards the end of this year, the United States has had no firm assurances that the Canadian Government, after review of an application, will authorize construction of a trans-Alaska-Canada oil pipeline. Further, no organization with access to the financial and technical resources necessary to construct such a line has indicated any interest in building such an oil pipeline. Consequently, whether Canadian authorization and subsequent construction of a trans-Alaska-Canada oil pipeline would result if the pending applications are rejected must be considered to be speculative. On the other hand, it is certain that a trans-Alaska line will be built if the applications are approved.

The Canadian Government has said that, even if it should be willing to authorize a trans-Alaska-Canada pipeline at some future time, it would require Canadian control over a substantial amount of the capacity of the line for the transport of Canadian oil. It is clear, therefore, that a substantial part of the throughput capacity of trans-Alaska-Canada line would not be available to transport North Slope oil.

On the other hand, all the capacity of the trans-Alaska line would be available for North Slope oil and all of that capacity would be available for delivery to the United States. With respect to all factors involved in the present situation, it is in the national interest that the United States have control over and access to the entire capacity of the oil pipeline for transporting North Slope oil.

Construction of a trans-Alaska-Canada line could begin at the earliest 3 to 5 years later than could construction of the proposed trans-Alaska line, as confirmed by officials of

the Canadian Government. This is because of the following problems in concluding the necessary arrangements: delay in arranging financing; delay in working out the necessary agreements among the United States, Canada and the oil pipeline companies; and delay pending completion of environmental, engineering and construction studies for the trans-Alaska-Canada route. Construction of the trans-Alaska-Canada line would take more time than would the proposed trans-Alaska line. The delay that would result from choosing the trans-Canada-Alaska route over the proposed trans-Alaska pipeline is significant and would result in several consequences adverse to the national interest of the United States: the nation would be dependent on insecure foreign sources of oil during the period of delay to an extent that is not in the national interest; the nation would forfeit a substantial resource cost saving for each year of such delay; and the State of Alaska and the Alaskan Natives would have the realization of substantial revenues postponed at a time when they are needed.

Without the construction of another pipeline in addition to the existing Transmountain Pipeline from Edmonton to Seattle, the trans-Alaska-Canada line would not be able to deliver significant amounts of oil to the West Coast, while the proposed trans-Alaska line would deliver sufficient oil to relieve the dependency of Petroleum Administration District V on insecure foreign oil.

If the pending applications were rejected and thereafter a pipeline were constructed along the trans-Alaska-Canada route, the following consequences would result: the United States would be more dependent on Canadian oil, a foreign oil source, than it would with the proposed trans-Alaska line, with consequential unfavorable balance of payments effects and added resource costs to the nation; and the ancillary benefits to the United States merchant marine industry that would result from the proposed trans-Alaska pipeline would be lost.

Having considered all the foregoing and all material before the Department, it is further concluded that: (1) the national interest requires the rapid development of North Slope oil; (2) it is in the national interest to have a pipeline for the transport of North Slope oil under the total jurisdiction, and for the exclusive use, of the United States; (3) based on an evaluation of all factors, including national policy and the impact on the quality of the human environment that is both certain and threatened, the Alyeska proposal is, from the standpoint of the overall national interest, acceptable and preferable to any other alternative that has been suggested for transporting North Slope oil; (4) rejection of the Alyeska proposal or any further delay in making a determination with respect to that proposal is not in the national interest; (5) approval of the proposal and granting the permits necessary therefor is in the national interest and is consistent with all the policies set forth by Congress, including those contained in the National Environmental Policy Act of 1969; and (6) approval of the State proposal is in the national interest as well as the interest of the State of Alaska and is consistent with all the policies set forth by Congress, including those contained in the National Environmental Policy Act of 1969.

Therefore, both the Alyeska and State proposals should be allowed to go forward. The Bureau of Land Management will be instructed to issue the requisite permits as soon as it is legally permissible to do so.

May 11, 1972

/s/ Rogers C. B. Morton
Secretary of the Interior

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE WILDERNESS SOCIETY, ET AL., *Plaintiffs*,

v.

ROGERS C. B. MORTON, ET AL., *Defendants*.
Civil Action No. 928-70

MOTION OF PLAINTIFFS FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rules 54(b) and 56 of the Federal Rules of Civil Procedure, plaintiffs, The Wilderness Society, Friends of the Earth, and Environmental Defense Fund, Inc., hereby move the Court for Partial Summary Judgment in their favor on the Mineral Leasing Act issues as set forth in their complaint.

The grounds for the plaintiffs' motion are that the Mineral Leasing Act issues present threshold questions resting on operative facts that are different from and independent of the operative facts of plaintiffs' claims under the National Environmental Policy Act ("NEPA"); the NEPA issues need be adjudicated only if the permits contemplated by the Secretary are not prohibited by the Mineral Leasing Act; and if said permits are prohibited by the Mineral Leasing Act, it would be a waste of judicial time and effort for this court to adjudicate the far more complicated NEPA issues which would, in that event, be reduced to hypothetical questions. Since there is no genuine issue as to any material fact insofar as the Mineral Leasing Act is concerned and plaintiffs are entitled to a judgment as a matter of law, there is no just reason for delay and every reason for a final adjudication of these issues.

The motion rests on the pleadings herein and on plaintiffs' Memorandum of Points and Authorities and Statement of Material Facts as to Which Plaintiffs Contend

Contend There is No Genuine Issue, together with the documents attached thereto.

Respectfully submitted,

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May 12, 1972

Civil Nos. 928-70 and 861-71

(CAPTION OMITTED)

DEFENDANT'S MOTION TO PLACE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT IN ABEYANCE

In response to plaintiffs' motion for partial summary judgment, defendant Alyeska Pipeline Service Company moves the Court to relieve all parties from any necessity

of responding thereto, to withhold any action and consideration of plaintiffs' motion until such time as the pretrial conferences and related procedures requested in an accompanying motion by defendant this date have been completed, and the entire case is ready for submission to the Court.

The reasons for this motion are set forth in the attached memorandum.

A proposed order setting forth the substance of the motion is attached hereto for the Court's consideration.

Respectfully submitted,

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May 17, 1972.

(CAPTION OMITTED)

MEMORANDUM OF ALYESKA PIPELINE SERVICE COMPANY IN SUPPORT OF DEFENDANT'S MOTION TO PLACE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT IN ABEYANCE

A. *Status of the Cases*

On March 26, 1970, the Wilderness Society and other plaintiffs instituted this action to enjoin the Secretary of the Interior from issuing rights-of-way and permits necessary for the construction of the proposed trans-Alaska pipeline system. On April 23, 1970, this Court issued a preliminary injunction preventing construction of a "haul road" over public lands of the United States from Prudhoe Bay to the Yukon River and the use of gravel from public lands of the United States for such a road. The Court also enjoined the issuance of any permit for construction of any section or component of the trans-Alaska pipeline system unless plaintiffs were given fourteen days' notice and an opportunity to challenge the legality of such permit.

In September 1971 Alyeska Pipeline Service Company (hereafter "Alyeska") and the State of Alaska were permitted to intervene. In April 1971 the Cordova District Fisheries Union instituted another action against the Secretary to enjoin the issuance of rights-of-way and permits and for declaratory judgment determining that a revocable permit issued by the United States Forest Service for the use of land within Chugach National Forest is invalid. Both cases have now been consolidated. Answers filed by the defendant Secretaries and the intervening defendants Alyeska and the State of Alaska contest plaintiffs' allegations, raise jurisdictional and other questions relating to plaintiffs' ability to maintain this action, and raise affirmative defenses.

In August 1971 plaintiffs Cordova District Fisheries Union moved for partial summary judgment on the question of the unlawfulness of the special use permit issued

October 1, 1969 by the Forest Service to certain of Alyeska's owner companies for the use of certain lands in the Chugach National Forest. Prior to the filing of any memoranda by the defendants opposing that motion of the plaintiffs on its merits, this Court heard a motion by the Secretary of the Interior to place plaintiff's motion for partial summary judgment in abeyance. Defendant's motion at that time urged the plaintiff's motion be held in abeyance until the Secretary of the Interior made a decision with respect to issuance of the permits and the entire case was ready for submission to the Court. On October 19, 1971, the Court granted defendant's motion to hold plaintiff's motion for partial summary judgment in abeyance and deferred plaintiff's motion until further order. On that occasion, the Court noted:

> I think we have to dispose of all of [the issues], and probably dispose of them together. . . . So I am not going to act on any partial summary judgment at this time. . . . You come popping in if you feel you are in imminent danger of some bad results and we will hear you. Otherwise, we will let it rest in abeyance. (Transcript, Oct. 15, 1971, at 6, 8.)

On April 20, 1972, the Secretary of the Interior issued a multi-volume Final Environmental Impact Statement pertaining to the subject matter of this litigation. On May 11, 1972, the Secretary served notice of his intention to issue permits to Alyeska and the State of Alaska for the pipeline and highway respectively. On the following day, May 12, 1972, other plaintiffs, the Wilderness Society, *et al.*, filed a second motion for partial summary judgment.

Alyeska has today filed a motion for scheduling of pretrial conferences and related procedures. At the same time, Alyeska is also filing the present motion requesting this Court to hold plaintiffs' motion for partial summary judgment in abeyance until such time as the pretrial conferences and related procedures have been completed, and the entire case is ready for submission to the Court. As set

forth below, Alyeska believes that its motion to hold plaintiffs' motion for partial summary judgment in abeyance should be granted since the present adjudication of plaintiffs' motion would disrupt the orderly consideration of this case and would likely to result in additional delay to its conclusion.

In addition, Alyeska believes that its present motion and its motion for scheduling of pretrial conferences and procedures should be given priority of consideration before plaintiffs' motion for partial summary judgment. In any event, Alyeska's time to answer the lengthy and complex contentions of plaintiffs' motion should be extended until a reasonable time subsequent to the resolution of defendant's present motion.

B. *A Hearing at the Present Time on Plaintiffs' Motion for Partial Summary Judgment Will Neither Serve the Purpose of Rule 56 Nor Contribute to the Efficient Handling of This Litigation.*

Plaintiffs' present motion is the second such filed in this case. With the recent addition of still more parties, more such motions may be forthcoming. Plaintiffs' motion presents only a few of several major issues pending before the Court. How all these issues ought to be brought to hearing and resolved by the Court is the subject of defendant's motion for scheduling of pretrial conferences and procedures filed today. Alyeska views its motion for scheduling of pretrial conferences and related procedures as the best method of resolving the manner and time of the Court's hearing of the issues in this case. Hearing of plaintiffs' motion now and separately from the other issues in this case will neither serve the purposes of Rule 56, nor contribute to the efficient handling of this litigation.

Whether to proceed with a hearing on a motion for summary judgment or partial summary judgment is a matter committed to the sound discretion of the Court. *Williams* v. *Howard Johnson's, Inc.*, 323 F.2d 102, 104 (4th Cir. 1963); *Clark* v. *Hancock*, 45 F.R.D. 512, 514 (S.D. Georgia 1968). The paragraphs below discuss the considerations which suggest that this Court should grant the motion to hold in abeyance plaintiffs' motion for partial summary judgment.

1. *Consideration of a partial summary judgment motion on its merits at the present time will not contribute to the efficient resolution of this litigation.*

Rule 56 of the Federal Rules of Civil Procedure providing for summary judgments is to be read in *pari materia* with Rule 1 of the Federal Rules which admonishes that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Its principal purpose is "to eliminate needless trials where there are no issues of material fact." *Chambers* v. *United States*, 357 F.2d 224 (8th Cir. 1966); *Rogers* v. *Peabody Coal Co.*, 342 F.2d 749 (6th Cir. 1965); *Clark* v. *Hancock, supra*. As in the case of the other Federal Rules, summary judgment procedures "should be applied in a common sense manner to the realities of the litigation at hand." *Wiliams* v. *Howard Johnsons, Inc., supra* at 105. In short, summary proceedings are only a means to an end and Rule 56 is to be applied, as the Court noted in *Gray Tool Co.* v. *Humble Oil & Refining Co.*, 186 F.2d 365 (5th Cir. 1951), with wise discernment:

> [T]his is another of those all too numerous instances of the misuse of the summary judgment procedure to cut a trial short; . . . here as too often before, it has served only to prove that short cutting of trials is not an end in itself but a means to an end, and that in the conduct of trials, as in other endeavors, it is quite often true that the longest way around is the shortest way through.

Here, the principal purpose of Rule 56 will not be served by going forward with a hearing on plaintiff's motion for partial summary judgment. The numerous allegations con-

tained in the complaints of the several plaintiffs, all of which are raised for the purpose of preventing construction of the trans-Alaska pipeline, will clearly necessitate the scheduling by this Court of a hearing on the merits at some point in the near future. A hearing on plaintiff's present motion for partial summary judgment will not obviate the requirement for further judicial proceedings.

Plaintiffs' motion for partial summary judgment under Rule 56 should not be viewed in isolation. The purposes of Rule 56 should be considered in light of the purposes of Rule 16.

> It seems quite apparent that the draftsmen [of Rule 56] were attempting, by providing for partial summary judgment, merely to speed up the trial by eliminating what were not deemed proper issues. The rule is very similar to Rule 16 concerning pretrial procedure for formulation of issues by the court in conference with the parties. In fact, the drafters expressly indicated that the same purpose lay behind both. (*Leonard* v. *Socony-Vacuum Oil Co.*, 130 F.2d 535, 536 (7th Cir. 1942).)

In the Rule 16 motion and memorandum filed by Alyeska today, Alyeska proposes that the Court consider all the pending issues in this case at two pretrial conferences, and discusses the need for the Court to determine the proper scope of judicial review in advance of hearing of any issues, the need to identify both legal issues and desired witnesses and to provide for the completion of discovery proceedings, and the need to establish a timetable for subsequent phases of the litigation. In large part, these matters are as applicable to the phase of the case dealt with in plaintiffs' present motion as they are to other aspects of the lawsuit. In essence, defendant's motion for scheduling and plaintiffs' present motion ask for the same thing —resolution of what issues will be heard by the Court and an expeditious conclusion of the litigation. The Rule 16 procedure Alyeska suggests will provide a more orderly

and comprehensive resolution of the matters before the Court.

Alyeska, in its motion for pretrial procedures, has provided assurances that it will not move for summary judgment on any issues presently involved in this case without formal consultation and agreement with counsel for plaintiffs. In the same motion Alyeska indicated its willingness to file with this Court a formal undertaking or representation that it will take no action under any permit relating to construction until the controversy is finally adjudicated on the merits by this Court. By these representations, Alyeska believes that preliminary proceedings may be limited, subsequent phases of the litigation simplified and final disposition expedited.

2. *The issues raised with respect to the permits involve factual matters which apply to the entire case and are not appropriate for summary disposition.*

The granting of plaintiffs' motion for partial summary judgment would in fact complicate and delay the litigation under the guise of expediting it. Plaintiffs' motion attacks a series of questions relating to the various rights-of-way and permits requested by Alyeska. By their motion plaintiffs seek to preclude the issuance to Alyeska of a special land use permit (SLUP) for the construction zone adjacent to the pipeline right-of-way; to preclude SLUP's and other permits to Alyeska for the construction of pump stations, communications sites, remote control block valve sites, airfields, construction camps, materials sites, access roads and the like; and to preclude to the State of Alaska the issuance of highway construction permits, airport permits and free use permits for gravel. The questions thus raised touch every phase of the case.

Both the permit issues and those relating to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 *et seq.*, are inseparably associated with the technical details

of how the trans-Alaska pipeline system will be built. Alyeska is confident that when the plaintiffs' contentions are examined by this Court with a full factual understanding of the project, the scope of the Secretary's power to issue the requested permits and the past policies and practice of the Department of the Interior, the Court will reject those contentions. The necessity to consider such closely-related factual matters eliminates substantial savings of judicial or counsel time and effort by separate consideration of plaintiffs' present motion. It would simply mean that these issues would have to be considered again at a separate time. It would also mean that the entire fact picture would ultimately be considered in piecemeal form.

It will be necessary for the Court to weigh the validity of various interpretations of the right-of-way and permit laws and regulations giving full consideration to the reasons and basis for Interior Department and pipeline industry practice. These matters, too, involve factual understandings and factual nuances that affect the interpretation of the law and may well have to be set forth by affidavit or other evidence.

Furthermore, these issues are matters of great public importance and involve very substantial costs. The Court's judgment on such matters should be fully informed and the matters fully explored, rather than disposed of in summary proceedings. The approaches adopted by the courts in similar circumstances bear consideration here. *See, e.g., Arenas* v. *United States*, 322 U.S. 419, 431-432, 434 (1944); *Eccles* v. *Peoples Bank of Lakewood Village, Cal.*, 333 U.S. 426 (1948); *Edward B. Marks Music Corp.* v. *Foullon*, 10 F.R.Serv. 56c41, Case 7 (S.D.N.Y. 1947). *See* discussion of these cases in Moore's FEDERAL PRACTICE, ¶ 56.16 and ¶ 56.17 [1] (2d ed. 1971).

3. *If the Mineral Leasing Act issues are reached now, consideration of the NEPA issues will still be required.*

Efforts to build the trans-Alaska pipeline will not be terminated by an adverse ruling on the Mineral Leasing Act issues. In such an event, Alyeska, believing that important legal questions are involved, would seek appellate review, or take other appropriate actions to eliminate any constraints imposed by such a ruling. In these circumstances, the NEPA issues would clearly not be moot, and Alyeska would ask this Court to consider them as fully as if no ruling on the Mineral Leasing Act issues had been made. Not to do so would invite an unthinkable piecemeal approach to a litigation where over a billion dollars are at stake in lease, exploration, development, engineering, research, and design costs. The anticipated costs of a year's delay well exceed $150,000,000 in terms of increased pipeline costs alone, and the imputed interest cost on invested capital merely for the seven companies which own Alyeska (disregarding the many other companies who have no feasible transportation mode for oil discoveries on the North Slope) runs to tens of millions of dollars per year. The other defendants can speak for themselves, but it is clear that similarly impressive interests are involved on the part of the United States in terms of energy policy, and on the part of the State of Alaska in terms of the potentially critical impact of delay on the state's fiscal outlook. A "bits-and-pieces" litigation would wholly frustrate Rule 1's exhortation that the Rules be construed to secure the "just, speedy, and inexpensive determination of every action." The result, rather than saving court time, would merely be the ultimate reinstatement of some form of this litigation at some indefinable future time, with Lord-knows-what impact in terms of the scattering and unavailability of counsel who are now fully prepared to litigate the NEPA issues. In fact, the very expenditure of legal effort which plaintiffs asserted in connection with

their opposition to the government's § 1404 change in venue motion last summer documents the case, in terms of counsel time, for a nonpiecemeal approach. Clearly, only a small portion of that effort was on Mineral Leasing Act issues, just as an inconsequential portion of the enormous discovery effort in this case has been directed to Mineral Leasing Act issues.

In short, extensive discovery, collection of evidence, organizing and preparation of submissions concerning NEPA issues have been performed by counsel on both sides. Depositions have been conducted and more are now in preparation relating to NEPA issues. Except for legal arguments, the NEPA work has largely been completed. There is thus little time left to "save" in this respect.

4. *Granting of an appealable partial summary judgment in these circumstances would not expedite the case.*

Further, we note that partial summary judgment granted under Rule 56 does not necessarily amount to a final appealable judgment. However, in the event that the Court makes the determination asked by plaintiffs that there is no just reason for delay and enters a final judgment under Rule 54(b), appellate procedures will be initiated which will result in the pendency of trial and appellate matters at the same time. This may be appropriate in circumstances where an appellate ruling on one issue would provide necessary guidance to the trial court in a protracted proceeding. But where the resolution of one set of issues cannot be said to depend upon or await the resolution of another, such multiple proceedings would contribute to inefficiency rather than expedition. *Compare, G. D. Searle & Co.* v. *Institutional Drug Distributors, Inc.*, 151 F.Supp. 715 (S.C. Cal., C.D. 1957). Such a result would confound the traditional policy of the federal courts against piecemeal disposal of litigation and piecemeal appeals except where special circumstances provide justification. *See* Advisory Committee Note to Rule 54, 1946 Amendment. *And see* a state

case based on a similar rule, *Mayhury* v. *City of Seattle*, 336 P.2d 878, 882 (Wash. 1959), quoted with approval in Barron & Holtzoff, Federal Practice and Procedure, § 1241 (Wright ed. 1958):

> The prime purpose of all of the new rules, but more particularly the summary judgment rule, is to secure the "just, speedy, and inexpensive determination of every action." To now introduce an interlocutory appeal, where none existed previously, would put the whole process in reverse. Piecemeal appeals of interlocutory orders must be avoided in the interest of speedy and economical disposition of judicial business. To review the order complained of by certiorari would completely frustrate the very purpose of the summary judgment rule.

In short, difficult legal questions are presented in this case, reversal at one or another level of appeal is possible, and none of the special reasons to avoid ruling on all issues or to deviate from the practice of having a single set of hearing and appellate procedures operates in this case.

5. *Plaintiffs will suffer no prejudice from the deferral of their motion.*

Finally, as we have pointed out above, no construction will proceed without a decision by this Court, on the merits, of all matters pending in this case. Therefore, plaintiffs will suffer no prejudice if the Court defers consideration of their motion until the time when all issues can be heard on the merits.

6. *Conclusion*

For the reasons set forth above, Alyeska submits that its motion to hold plaintiffs' motion for partial summary judgment in abeyance should be granted and that no further action with respect to that motion should be taken until such time as the pretrial conferences and related proce-

dures have been completed, and the entire case is ready for submission to the Court.

Respectfully submitted,

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May 17, 1972.

(CAPTION OMITTED)

DEFENDANTS' MOTION TO WITHHOLD CONSIDERATION OF MOTION FOR PARTIAL SUMMARY JUDGMENT BY PLAINTIFF, WILDERNESS SOCIETY, ET AL.

For the reasons stated in the accompanying memorandum of points and authorities, the defendant, Rogers C. B. Morton, Secretary of the Interior, and Earl L. Butz, Secretary of Agriculture, hereby move the Court for an order deferring consideration of the motion by plaintiffs, Wilderness Society, et al., for partial summary judgment in this case.

In summary, the grounds for this motion are that to summarily dispose of this action on a single issue at this late date would result in great delay in the final resolution of the controversy, thus, work gross inequities upon the defendants and consequently be an inefficient, uneconomical use of the Court's time and the time and expense of the parties.

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DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SCHEDULING PRE-TRIAL CONFERENCES AND IN SUPPORT OF THEIR MOTION TO DEFER CONSIDERATION OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

On April 23, 1970, this Court in Civil Action No. 928-70 issued a preliminary injunction enjoining the defendant, the Secretary of the Interior, from issuing any permit in connection with the Trans-Alaska Pipeline System until that defendant had complied with the National Environmental Policy Act and "unless plaintiffs are given fourteen (14) days' notice prior to the planned issuance thereof and plaintiffs are given an opportunity to challenge the issuance of said permit." On April 20, 1972, the Secretary of the Interior filed a Final Environmental Impact Statement in connection with the proposed Trans-Alaska Pipeline applications in compliance with the National Environmental Policy Act. On May 11, 1972, the defendant, the Secretary of the Interior, served upon plaintiffs and filed a notice of his intention to issue the permits for which application had been made. That notice informed the Court and the plaintiffs of the intention of the Secretary of the Interior to issue a permit across public lands of the United States in Alaska for a right-of-way for the construction of the Trans-Alaska Pipeline and at such times as may be appropriate to issue other permits within his authority that may be required in connection therewith. That defendant also served notice of his intention to take action that will result in the State of Alaska acquiring a right-of-way for highway purposes over public lands of the United States in Alaska and to take such other actions within his authority as may be necessary to the construction of such a highway.

On May 12, 1972, the plaintiffs in Civil Action No. 928-70 served their motion for partial summary judgment on legal issues relating to the Minral Leasing Act of 1920,

30 U.S.C. 185, and raising questions concerning the validity of regulations governing public lands of the United States promulgated by the Secretary of the Interior. The motion for partial summary judgment also raises questions concerning the action of the State of Alaska, intervener-defendant, to acquire a right-of-way under R.S. Section 2477, 43 U.S.C. 932.

The defendants have moved the Court for an order deferring consideration of plaintiffs' motion for partial summary judgment on the following grounds:

I

Summary Disposition of this Action on a Single Issue at this Late Date in the Proceedings Would in Fact Result in Greater Delay in The Ultimate Resolution Of the Controversy

The plaintiffs' motion for partial summary judgment in actuality presents for determination a single question—that is—the validity of regulations promulgated by the Department of the Interior authorizing issuance of permits for temporary use of public lands of the United States and a somewhat related question as to the validity of action by the intervener-defendant, the State of Alaska, to acquire a right-of-way for a highway under 43 U.S.C. 932. In support of their motion for partial summary judgment, plaintiffs submitted voluminous documentation and a memorandum. Consideration of the matters presented not only will require considerable time and study by the Court, but even if, after argument on opposing memoranda by the defendants, the Court should conclude that plaintiffs' motion is well taken, the controversy will be far from concluded as plaintiffs assert.

Since an appeal may be taken as a matter of right from an order granting the motion for partial summary judgment, 28 U.S.C. 1292, there is little question that review would immediately be sought by the defendants. Pursuing

appellate review of course will require considerable time and no doubt it would be months before a decision by the Court of Appeals. If partial summary judgment should be granted and affirmed on appeal, there would still remain the question of seeking a writ of certiorari.

In the event of a reversal, then after many months the case would be back before this Court for determination of the issues presented by plaintiffs in connection with the National Environmental Policy Act. As the Court now knows, the case is almost now ripe for a decision on all of the issues presented, including the legal issues raised by plaintiffs' motion for partial summary judgment, the other legal issues raised by Cordova District Fisheries Union in a previous motion for partial summary judgment, and on the adequacy of the environmental impact statement and the Secretary's compliance with the National Environmental Policy Act. The defendants have filed a motion to schedule pretrial conferences which will result in an orderly resolution of all matters for decision.

A motion for summary judgment is addressed to the sound discretion of the Court. *Boston & Maine Railroad* v. *Lehigh & New England R. Co.*, 188 F.Supp. 486; app. dismissed, 287 F.2d 678. Considering the voluminous pleadings, affidavits, exhibits and memoranda; the extensive arguments of counsel during preliminary and interlocutory proceedings, the technical nature of the subject matter and the complexity of the legal issues and the controlling legislation are it is submitted, compelling reasons not to attempt to dispose of this controversy on a summary motion.

As the Supreme Court has stated:

> Summary procedures, however salutary where issues are clear-cut and simple presents a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated causes of legislation, contracting and practices. *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-257.

The Supreme Court in that case also stated that it considered it the better part of good judicial administration to withhold decisions until a complete record is prepared which presents a solid basis for findings and conclusions.

Consideration of plaintiffs' motion for partial summary judgment at this time and in the present posture of this litigation will not actually serve the purposes of Rule 56, nor will it result in the orderly and efficient disposition of the litigation. As shown below, to make a piecemeal determination is to invite delay in the final outcome which in this case would result in gross inequity to the defendants.

II

Consideration of the Motion for Partial Summary Judgment at this Time Could, and Would if the Motion Were Granted, Result in Gross Inequities to the Defendants

During the two years in which the preliminary injunction has been in force the Department of the Interior, in cooperation with and with the assistance and advice of independent experts, was engaged in the preparation of the Final Environmental Impact Statement. Because of the nature of the proposed project, that statement is by far the most voluminous impact statement prepared since the enactment of the National Environmental Policy Act.

Although the United States is not nominally a party to this action, it is obviously a real party in interest, and the cost to the Government of preparing the Final Environmental Impact Statement is estimated at several million dollars, and required two years of constant work by numerous personnel. The defendant, the Secretary of the Interior, did not make a decision as to his intention to issue the permits applied for until after the Final Environmental Impact Statement was completed and comments were received on it. However, the defendants now suggest that it may not have been premature on the part of the

plaintiffs, acting in good faith, to have amended their complaint two years ago and requested a declaratory judgment as to the validity of the actions proposed under the Mineral Leasing Act and the regulations concerning the temporary use of public lands. It occurs to the defendants that such relief could have been sought within the past two years and if plaintiffs' contentions are well founded, such action would have saved everyone, including the Court, the time and expense which would now be incurred by immediate consideration of the plaintiffs' present motion.

Moreover, during the past two years, as pointed out by the intervener-defendants, the Alyeska Pipeline Service Company also has incurred expenses running into the millions.

In view of the foregoing, it is submitted that this case should not be fragmented at this late date. Instead it is respectfully suggested that the Court should grant the defendants' motion and the intervener-defendants' motion to schedule the case for pretrial conferences as outlined in those motions and supporting memoranda and merely reserve for future argument and future decision the questions raised in plaintiffs' motion.

III

Since the filing by plaintiffs of their motion for partial summary judgment, plaintiffs on May 16, 1972, served a motion for leave to file an amended and supplemental complaint together with a proposed amended and supplemental complaint. Plaintiffs informed the Court the amended and supplemental complaint is designed merely to bring the pleading to a current status. However, even if that were true, the amended and supplemental complaint consists of 27 pages, containing 48 separately numbered paragraphs and numerous numbered paragraphs extending for from two to three pages. Whether or not the amended and supplemental complaint in fact presents nothing new in substance can be ascertained only after an appropriate time is allowed for study and for the filing by the defendants of an answer.

The amended and supplemental complaint filed is another example of the refusal or failure of plaintiffs to comply with the elementary rules of pleading. The complaint fails to set forth "a short and plain statement" as required by Rule 8 and the separately numbered paragraphs running only to number 48 are misleading since, as noted, several paragraphs contain two or three pages of allegations, thus failing to comply with Rule 10(b).

For the sake of economy of time, defendant will endeavor to respond to that amended and supplemental complaint. However, appropriate time is required and if for no other reason, plaintiffs' motion for partial summary judgment should be deferred now until an answer can be prepared and filed.

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PLAINTIFFS RESPONSE TO DEFENDANT'S MOTION TO DEFER CONSIDERATION OF PLAINTIFFS MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER THE MINERAL LEASING ACT

Defendant Alyeska appears intent on involving this Court in a moot court competition.

If, as plaintiffs contend—and as this Court found in April, 1970—the Mineral Leasing Act means 50 feet when it says 50 feet; and if, as plaintiffs contend—and Alyeska does not dispute—the Secretary intends to issue permits for much more than 50 feet; then there is simply no need for this Court to involve itself at this time in an intellectual exercise as to whether the more complex requirements of the National Environmental Policy Act have been followed.

Unlike the NEPA issues, which have evolved both factually and legally over the more than two years that have elapsed since this Court's preliminary injunction, and which now require the completion of extensive discovery that has been deferred to this time by defendants, the Mineral Leasing Act issues remain unchanged. There have been no new judicial interpretations of the Mineral Leasing Act since April, 1970; there have been no Congressional amendments to the Act since April, 1970; and the nature of the oil companies' requests has not changed since April, 1970, except insofar as they are now requesting even more public lands than they did then.

The oil companies have had three full years to figure out why the Mineral Leasing Act does not mean 50 feet when it says 50 feet. Surely, they—and the Secretary—should now be required to provide their explanations. For, clearly, if the Secretary has authority only to issue permits of 50 feet, it is irrelevant whether he has given proper consideration to the environmental impact of permits in excess of 50 feet.

Plaintiffs suggest, therefore, that defendants be required to file responsive briefs to plaintiffs' Motion for Partial Summary Judgment within ten (10) days (they have already had the motion for seven days); followed by an expeditious consideration by the Court of the merits of plaintiffs' motion. If the Court concludes that plaintiffs' contentions are clearly correct—as it preliminarily concluded in April, 1970—it can then afford defendants the opportunity of an expedited appeal (which defendants could make either to the Court of Appeals or as may be far more appropriate, and [illegible] to Congress).

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EXCERPT FROM BRIEF OF APPELLEE ALYESKA PIPELINE SERVICE COMPANY COVERING MINERAL LEASING ACT AND TERMINAL FACILITY ISSUES. PP. 35-50

b. Revocable Permits Have Been Extensively Utilized by the Department of Interior for Many Years

(1) *The General Practice*

The Secretary of the Interior issues revocable permits, denoted SLUPs, under 43 C.F.R. Part 2920. The regulation states that it is the policy of the Secretary to issue permits for the beneficial use of the public lands "for special purposes not specifically provided for by existing law."[50] The regulation also states that a permit will not be issued where the provisions of any law may be invoked, or where it would be "inconsistent" with the land regulations of the Department or "in conflict" with law.[51] It provides that the permit "will be revocable in the discretion of the authorized officer at any time, upon notice, if in his judgment the lands should be devoted to another use or the conditions of the permit have been breached."[52] The regulation also makes provision for limitation of the size of the area permitted to that determined "necessary for the contemplated use," for imposition of stipulations considered necessary for protection of the lands and resources involved and the public interest in general, and for removal of improvements by the permittee on revocation or expiration of the permit.[53]

The regulation described refers, as the source of its authority for the issuance of SLUPs, to the statutes providing for the performance of all executive duties relating to the public lands by the Director of the Bureau of Land Management (BLM) under the direction of the Secretary of the Interior.[54] The regulation makes no reference to § 28 as authority. The practice in Interior is given additional support by the long-standing SLUP practices of the Department of Agriculture, which has given similar interpretations to its management authority.[55]

The published statistics of the Department of Interior reflect a large variety of uses authorized under special land use permits. Many of these uses have involved activities of a somewhat permanent nature. The Bureau of Land Management has authorized SLUPs for the following representative uses among others: government administrative sites, military sites, camp sites, warehouses, schools, water-supply developments, receiver station, public parking areas, aid-to-navigation sites, recreational sites, cemeteries, storage sites, sewage sites, fire stations, churches, fishing sites, airport sites, gospel missions, dock sites, communication centers, construction camps, boathouse sites, residence sites, garbage dumps, ore depots, pistol and rifle ranges, radio stations, dams, reservoirs, wells, signboards, water pipelines, aerial training sites, target sites, forest firebreaks, park trails, berms and ditches, fish hatcheries, tree nurseries, processing sites, storage ponds, sawmills, maintenance sites, oil tanks, bee-culture sites, ore stockpiling, stockyards, explosive storage gasoline storage, wildlife refuges, public roads, snow fences, office buildings, loading sites, agricultural uses, scouting purposes, ammunition purposes, launching ramps, gravel plants, ecology study, drainage barrels, experiment stations, instrument sites, observation sites, Indian school, disposal plants, powder magazines, rock-crushing plants, logging yards, millsites, crab-

[50] 43 C.F.R. § 2920.0-2.

[51] *Id.*

[52] *Id.* § 2920.3(a)(1).

[53] *Id.* § 2920.3(a)(2); § 2920.3(b); § 2920.5(d).

[54] *Id.* § 2920.0-3. The statutes referred to are 43 U.S.C. §§ 1, 2, 1201, 1361-1364, and 1411-1418. Section 1201 authorizes the Secretary or his designee to issue regulations to enforce and execute all provisions of Title 43 "not otherwise specially provided for."

[55] The management authority of the Secretary of Agriculture is discussed in detail in Part Two, *infra*, at 96-130.

bing sites, garden sites, university purposes, farm and homesites purposes, quarry sites, garden sites, lookout sites, protection roads, guard stations, access roads, spring development, fire trails, telephone rights-of-way, water stage recorders, building sites, boatlanding sites, transmitter sites, government headquarter sites, industrial sites, waterholes, logging camps, barn sites, corral sites, cable crossings, toolhouses, material stockpiles, monument-marker sites, grain elevators, testing facilities, radio towers, gravel pits, movie towns, railroad sidings, coal crushers and bins, ski lodges, checking stations, rodeo arenas, soapbox derby runways, mining sites, meeting halls, power substations, railroad purposes, trout-rearing ponds, cannery sites, restaurant sites, seaplane base sites, trading post sites, and fairgrounds. *See* Department of the Interior (DOI), Report of the Director of BLM, Statistical Appendix, at 28-32 (1955); *id.*, at 30-32 (1950); DOI, Report of the Commissioner of the General Land Office, Statistical Appendix, at 28 (1945).

More than one million acres were covered by SLUPs issued by BLM as of June 30, 1970. There were 1,111 BLM SLUPs in effect on that date covering 1.37 million acres. Department of the Interior, Public Land Statistics, at 31, 58 (1970). The use of such permits by BLM has remained at a high level for many years. A representative sampling of the figures for earlier years is:[57]

[57] *See* respectively Department of Interior (DOI), BLM, Public Land Statistics, 30, 58 (1969); *id.* at 38, 60 (1968); *id.* at 40, 63 (1965); DOI, Annual Report of the Director, BLM, Statistical Appendix 43, 71 (1960); *id.* at 46 (1958); *id.* at 27-30 (1957); *id.* (1956); *id.* at 28-32 (1955); *id.* at 28-31 (1954); *id.* at 28-32 (1953); *id.* at 30-33 (1952); *id.* at 30-34 (1951); *id.* at 30-32 (1950); *id.* at 31-32 (1949); *id.* at 30 (1948); *id.* at 32 (1947); DOI, Report of the Commissioner of the General Land Office, Statistical Index at 28, 29 (1946); *id.* at 28 (1945); *id.* at 46 (1944); Report of the Commissioner of the General Land Office, Division of Planning at 55-56 (1943); *id.* at 51 (1942); *id.* at 56 (1941).

For a more comprehensive indication of such uses, see the extracts from annual reports of the DOI in Supporting Documents, Vol. II, Tab 9.

Year	Acres	No. of Permits Issued
1969	1,200,000	1,168
1968	1,200,000	1,166
1965	870,000	1,166
1960	915,000	Not Published
1958	476,125	Not Published
1957	2,381,724	Not Published
1956	1,125,587	Not Published
1955	1,147,497	Not Published
1954	1,520,978	Not Published
1953	1,185,391	Not Published
1952	591,891	Not Published
1951	446,918	Not Published
1950	402,917	70
1949	404,936	54
1948	398,574	27
1947	393,572	23
1946	393,280	123
1945	393,175	102
1944	634,809	86
1943	314,965	88
1942	Not Published	44
1941	Not Published	4

Aside from the Department of the Interior, the Department of Agriculture also issues revocable land use permits extensively. Many of the uses also have been of a long-term nature. Moreover, many of them have involved the prospect of large capital investment in the permitted lands. The Secretary of Agriculture as of 1967 had granted 63,000 term and revocable permits (85% of them revocable) covering 80 different types of uses, of which approximately 53,000 involved permittee-built and owned improvements for such uses as airports, bathhouses, mills, observatories, rifle ranges, schools, stores, and ski-tows. The estimated value of these improvements is thought to have possibly

exceeded $1 billion. Hearings before the Subcommittee on Forests of the House Committee on Agriculture, 90th Cong., 1st Sess., Ser. J, pt. 2, at 2-4, 13 (1967). Published reports of the Department of Agriculture regularly set forth statistics on revocable permits.[58]

(2) *Pipeline Uses*

There is nothing novel about the Interior Department practice of permitting temporary use of adjacent land in conjunction with pipeline rights-of-way under § 28. As the affidavits of BLM officials indicate, it has been the well-established administrative practice and policy of the BLM to allow the temporary use of public lands in conjunction with all kinds of authorized activities on lands administered by the Bureau.[59] The temporary use for pipeline construction purposes along the § 28 right-of-way is just another example of the general practice and policy. *See* the affidavits of Bureau of Land Management officials Harold A. Berends, Theodore J. Bingham, Stuart W. Gearhart and Malcolm L. Johnson, in Supporting Documents, Vol. I, Tabs 6-9.

Over the years, according to the BLM officials' affidavits, the BLM's approval of temporary uses for pipeline construction purposes has generally been informal, apparently based on implied powers obviously required to effectuate § 28. The companies have simply made temporary use of more land in constructing pipelines than the width specified

[58] For example, there were 63,386 permits outstanding in 1965 covering 5,075,529.63 acres, excluding SLUPS to DOI and FPC. Department of Agriculture, Forest Service, Special-Use Permits Biennial Report (1965), Supporting Documents, Vol. II, Tab 11.

[59] *See, e.g.*, BLM SLUP Arizona A4291 (batch plant and crusher site, material stockpiles and storage in conjunction with highway right-of-way); Arizona A1904 (temporary road connection in conjunction with highway right-of-way); California 02-71-01 (water well and pipe in conjunction with telephone company power feed building site).

in their permanent easements granted pursuant to § 28.[60] The Bureau indicates that it has been well aware of this practice and has permitted it as not inconsistent with the permanent right-of-way granted under § 28.[61] A practice has evolved in recent years whereby some field offices now formalize the temporary use of additional land for construction purposes by issuing special land use permits. This procedure is being utilized especially in situations where either the grantee of a pipeline right-of-way might be careless in his use of additional land, or where environmental damage is likely outside the right-of-way, and the granting officer desires to impose certain controls. The Bureau officials indicate that they are aware of no instance in which action has been taken to prevent the temporary use of additional space for pipeline construction purposes.

There are more than half a million miles of liquid and gas pipelines throughout the United States.[62] Many thousands of miles of these are cross-country pipelines which traverse the public lands in the western states and require authorization under § 28 of the Mineral Leasing Act. These include large lines ranging up to 36 and 42 inches in diameter. Obviously, such pipelines crossing the public lands have required the use of temporary construction and access space under authority provided by the Bureau of Land Management.

Customary practice in the pipeline industry is to utilize during pipeline construction amounts of land varying in

[60] *See also*, affidavits of James W. Hall, Alton W. Tyler, and Max Krutsinger, in Supporting Documents, Vol. I, Tabs 2, 3 and 5.

[61] *See also, id.*

[62] This figure includes only crude oil and gas gathering and trunk transmission lines, and product lines. It excludes gas distribution lines. Department of Transportation, Office of Pipeline Safety, Transmission and Gathering Report for Calendar Year 1970 at 1001 (1971); Department of the Interior, Bureau of Mines, Mineral Industry Survey, January 1, 1971.

width depending upon the type and condition of the terrain traversed.[63] Ordinarily, a strip of land approximately 100 feet in width is required for construction of medium to large diameter lines in order to provide room for the ditch, the ditch spoil, space to maneuver vehicles and heavy equipment, and space for bending, welding and handling of the pipe.[64] The space required for construction may substantially exceed 100 feet where topography or soil conditions require.[65] For example, cutting of slopes, crossing of rivers, or construction on unstable ground may require as much as 600 feet of width on a temporary basis.[66]

It is clear that normal pipeline construction practices involving the use of substantial widths of land in addition to the permanent right-of-way have ordinarily been permitted by the responsible officials of the BLM, including the use of very wide additional space on a temporary basis during construction in difficult areas.[67]

Even in circumstances in which unusually strict construction standards were imposed, such as in national monuments and some forest lands, these restrictions ordinarily

[63] Affidavits of Harold A. Berends, Theodore G. Bingham, Stuart W. Gearhart, Malcolm L. Johnson, Dean F. Smalley, James W. Hall, Alton T. Tyler, and Max Krutsinger, in Supporting Documents, Vol. I, Tabs 1-3, 5-9.

[64] Affidavits of Dean F. Smalley, James W. Hall, Alton T. Tyler, Haven E. Van Heusen, and Max Krutsinger, in Supporting Documents, Vol. I, Tabs 1-5.

[65] Affidavits of Dean F. Smalley, James W. Hall, Alton T. Tyler, in Supporting Documents, Vol. I, Tabs 1-3.

[66] Affidavit of Alton T. Tyler, in Supporting Documents, Vol. I, Tab 3.

[67] Affidavits of Harold A. Berends, Theodore G. Bingham, Stuart W. Gearhart, Malcolm L. Johnson, James W. Hall, Alton T. Tyler, Haven E. Van Heusen, and Max Krutsinger, in Supporting Documents, Vol. I, Tabs 2-9.

did not relate to the width of land used.[68] In some respects, the practice of the Department of the Interior with respect to permitting the use of construction and access space is difficult to document because of its informality. Where permission is granted for ingress and egress to the primary right-of-way under the implied authority of § 28 of the Mineral Leasing Act, there would rarely be occasion to provide a written record.[69] Nevertheless, the Bureau of Land Management files do reflect the issuance of supplemental SLUPs to provide additional land paralleling the § 28 rights-of-way for construction purposes. *See, e.g.*, BLM SLUPs Oregon OR 010647 (September 1, 1960); Oregon OR 010659 (October 5, 1960); Idaho I 011837 (September 8, 1960); New Mexico NM 9466 (June 5, 1969); New Mexico NM 13111 (January 7, 1971). In one instance, the use of a strip of land 50 feet wide and 31.5 miles long was provided under two three-year SLUPs parallel to and contiguous with a gas pipeline right-of-way granted under § 28. *See* BLM SLUPs Oregon OR 010647 and OR 010659, *supra*. One of these SLUPs indicated that its purpose was to "construct, operate and maintain a natural gas pipeline and store construction equipment temporarily." In another instance, a one-year SLUP was given for a 25-foot strip, 22.5 miles long, parallel to and contiguous with four § 28 pipeline rights-of-way. The purpose of this SLUP was to "facilitate pipeline construction." *See* BLM SLUP, New Mexico NM 9466.

Several such SLUPs were obtained by Pacific Gas Transmission Company. As the affidavit of Haven E. Van Heu-

[68] Affidavits of James W. Hall, and Alton T. Tyler, in Supporting Documents, Vol. I, Tabs 2-3.

[69] Although the regulations have provided since 1959 for additional rights-of-way for ingress and egress, 43 C.F.R. § 2801.1-3, this provision gives greater rights than are generally needed for temporary construction uses, and it does not appear to be used for this purpose.

sen [70] indicates, these were obtained as a result of the need of Pacific Gas for the use of additional 50- and 25-foot strips for temporary construction space during construction of the Alberta to San Francisco 36-inch gas pipeline. This affidavit reflects that no instances occurred in connection with that pipeline project in which Bureau of Land Management officials failed to permit the use of temporary construction space requested. The experience of Pacific Gas would appear to be typical of those cases in which the formal route of obtaining SLUPs was used, rather than proceeding under the implied necessities doctrine under § 28.

In short, the present practice of the Department of the Interior with respect to use of temporary widths adjacent to the pipeline right-of-way for construction and access needs reflects an old, well-established informal policy and practice which, more recently, has been evolving into a formalized procedure. But regardless of the procedure employed, there very clearly has been and is a consistent practice of permitting the use of additional space on a temporary basis where this is reasonably necessary.

c. Congress Has Acquiesced in the Practice of Utilizing Revocable Permits

(1) *Notice of the General Practice*

The use of revocable permits has been brought to the attention of Congress on many occasions. As early as 1898, in concluding that a revocable permit for a street railroad was authorized by law, the Attorney General found an implied knowledge and consent to such uses on the part of Congress:

> Long-continued exercise of a power of this kind . . . and the open and notorious use of government reservations by such licensees without legislative objection from Congress and without the adoption of any legislative rule upon the subject, implies the tacit assent of Congress to this custom. [22 Op. Att'y Gen. 240, 245 (1898).]

[70] Supporting Documents, Vol. I, Tab 4.

More recently, Congressional committees have given explicit recognition to the broad use of revocable permit powers by executive officials:

> The Department of Agriculture now has adequate authority to issue revocable permits *for all purposes* under the act of June 4, 1897 (16 U.S.C. § 551). [H.R. Rep. 2792, 84th Cong., 2d Sess. 2 (1956) (emphasis added).] [71]

An awareness that revocable permit practices extended to both Interior and Agriculture is reflected in H.R. Rep. 2243, 83d Cong., 2d Sess. (1954). Congress has indicated its awareness of the use of revocable permits on other occasions as well. Congressional proposals relating to land use authorizations of the Secretaries of Interior and Agriculture have frequently included declarations and findings that the Secretary could issue and was issuing revocable permits for various purposes under authority of the general laws relating to lands under their jurisdiction. *See* S. Rep. 967, 61st Cong., 3d Sess. 1 (1911); S. Rep. 754, 72d Cong., 1st Sess. 2 (1932); H.R. Rep. 805, 80th Cong., 1st Sess. 2 (1947); Hearings on H.R. 1809 before Subcommittee No. 2 of the House Committee on Agriculture, 80th Cong., 1st Sess. 2, 6 (1947); S. Rep. 899, 80th Cong., 2d Sess. 2 (1948); S. Rep. 1224, 82d Cong., 2d Sess. 1, 3, 4, 5 (1952); H.R. Rep. 1742, 83d Cong., 2d Sess. 2 (1954); S.

[71] The same language appears in S. Rep. 2511, 84th Cong., 2d Sess. 1 (1956). The Act referred to gives the Secretary of Agriculture broad regulatory powers, including authority to "make such rules and regulations . . . as will insure the objects of such reservations [the public forests and national forests], namely, to regulate their occupancy and use. . . ." This is similar in scope to the statutes governing the revocable permit authority of the Secretary of the Interior.

Rep. 2511, *supra*, note 71 at 1 (1956); H.R. Rep. 2792, *supra*, at 2 (1956).[72] In 1967, Congress was again advised of the broad range of activities for which revocable permits had been issued, and of the extensive improvements that permittees under those permits had constructed. *See* Hearings before the Subcommittee on Forests of the House Committee on Agriculture, 90th Cong., 1st Sess., Ser. J, Pt. 2 at 2-4, 13 (1967).

(2) *Specific Notice Regarding Permits for the Trans-Alaska Pipeline*

In 1969, the Interior Department briefed both the Special Subcommittee on Oversight of the Senate Committee on Interior and Insular Affairs[73] and the full Committee[74] on plans for the pipeline. These briefings were in connection with a proposed modification of the public land "freeze" order[75] to permit construction to begin on the pipeline. Following extensive hearings which included frequent reference to the planned use of SLUPs for construction of the pipeline, the full Committee stated that it had no objections to the proposed modification of the "freeze"

[72] A number of quotations from these references are set forth, *infra*, at 113-115, in the discussion of issues raised by plaintiff *Cordova*, and will not be repeated here. The quotations leave no room for speculation regarding notice to the Congress.

[73] Hearing on Oversight of Oil Development Activities in Alaska before the Special Subcommittee on Legislative Oversight of the Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. (August 12, 1969).

[74] Hearings before the full Senate Committee on Interior and Insular Affairs, were held September 9, October 16, and November 25, 1969. Hearings on the status of the proposed Trans-Alaska Pipeline before the Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. (1969).

[75] Public Land Order No. 4582, January 17, 1969.

order.[76] The House Committee on Interior and Insular Affairs, similarly briefed,[77] signified its acquiesence in the issuance of the SLUPs in a resolution that stated in part:

> On the basis of the information furnished by the Department and the extensive hearings . . . the Committee has no objections to the proposed modification to the Public Land Order No. 4582, and the grant of the proposed right of way. . . .

This right to build the pipeline was recognized by the Committee to include the granting of "appropriate permits" to build, *inter alia:*

> Pumping plant sites, access facilities, terminal facilities, catch basins and *any other structures reasonably necessary or convenient* for transportation of oil by pipeline from . . . Northern Alaska to . . . the Gulf of Alaska. (emphasis added)[78]

In addition to these explicit references to rights to be granted by SLUPs, Congress has repeatedly been made aware of the Secretary's intended exercise of this power in the trans-Alaska pipeline case. The House Committee on Appropriations and the Senate Committee on Appropriations have appropriated funds for 1970, 1971, and 1972 to the Department of the Interior for the trans-Alaska

[76] Hearings on "Alaska Land Freeze—Trans-Alaska Pipeline System" before the House Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. 223-226 (1969) (unpublished transcript).

[77] Hearings on the trans-Alaska pipeline issue were held before the House Committee on Interior and Insular Affairs, July 30; August 6; October 1, 8, 21, and 28; November 12 and 26; December 16, 1969; and April 15 and 29, 1970. Hearings, *supra*, note 76. The hearings included testimony by Under Secretary Train and on-site inspections by Committee members.

[78] Hearings, *supra*, note 76, at 219-220, 258, 260 and 272.

project.[79] Each time these Committees have required full information regarding the amount of land required for construction of the pipeline, and were thoroughly briefed on the proposed issuance of special land use permits.[80] These briefings included testimony by then-Director of the Bureau of Land Management, Boyd L. Rasmussen, and BLM Deputy Assistant Director for Resources, Dale Andrus, that the pipeline would require a 54-foot right-of-way plus additional working land, to be provided by SLUPs for a total of 200 feet.[81] In addition, the Committees received from time to time status reports on the trans-Alaska pipeline, stating in part that special land use permits would be issued for construction camps and temporary communication sites.[82]

[79] That appropriations for a practice by a fully informed Congress amount to a ratification of that practice is made clear in *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 293 (1958); *Brooks* v. *Dewar*, 313 U.S. 354, 360-61 (1941). *See also Polson Logging Co.* v. *United States*, 160 F.2d 712, 715-16 (9th Cir. 1947).

[80] See *e.g.*, Hearings on H.R. 15209, Supplemental Appropriation Bill, 1970, before the Subcommittees of the House Committee on Appropriations, 91st Cong., 1st Sess. (1969); S. Rep. 91-616, 91st Cong., 1st Sess. (1969); H.R. Rep. 91-1095, 91st Cong., 2d Sess. (1970); S. Rep. 91-985, 91st Cong., 2d Sess. (1970); Hearings on H.R. 17619, Department of the Interior and Related Agencies Appropriations, before a Subcommittee of the House Committee on Appropriations, 91st Cong., 2d Sess. (1970); Hearings on H.R. 17619 Department of Interior and Related Agencies Appropriations, before a subcommittee of the Senate Committee on Appropriations, 91st Cong., 2d Sess. (1970).

[81] Hearings on H.R. 15209, Supplemental Appropriation Bill, 1970, before Subcommittees of the House Committee on Appropriation, *supra*, note 80 at 643-45, 658-59 (1969).

[82] See, *e.g.*, Hearings on H.R. 9417, Department of the Interior and Related Agencies Appropriations for 1972, before a subcommittee of the House Appropriations Committee, 92d Cong., 1st Sess., 335-40 (1971); Hearings on H.R. 9417, Department of the Interior and Related Agencies, Appropriation for Fiscal Year 1972 before a subcommittee of the Senate Committee on Appropriations, 92d Cong., 1st Sess. 136-139 (1971).

Finally, the most persuasive evidence of Congressional acceptance and approval of the practice of issuing SLUPs, and recognition of the special appropriateness of that practice in the trans-Alaska case, is presented in the Conference Committee Report accompanying S. 35 and H.R. 10367, the Alaska Native Claims Settlement Act, 85 Stat. 688, 43 U.S.C.A. § 1601, *et seq.* (Supp. April 1972). See H.R. Rep. 92-746, 92d Cong., 1st Sess. (1971). Ironically, plaintiffs have cited this Committee's action in substituting the House version of § 24(d)(3) of this bill for the Senate version as an example of Congress refusing to broaden the Secretary's discretionary powers in the trans-Alaska case.[83] Contrary to what the plaintiffs would have the Court believe, the Conference Committee substituted the House version because the Senate version would have *restricted* the Secretary's powers in dealing with the pipeline situation. Plaintiffs apparently overlooked the statement in the Conference Report explaining that the substituted version was chosen because:

> This language would also permit the Secretary, if he should so decide in the future, to grant the necessary rights-of-way, permits and other legal authority necessary for the construction of the proposed trans-Alaska oil pipeline. The conference committee did not consider the proposed pipeline in connection with the resolution of the differences between the bills, nor did the House or Senate Committees consider the proposed pipeline in connection with hearings on this subject. Accordingly, the conference committee takes no position on what action the Secretary should take with respect to the pending application. The conference committee does, however, want it clearly understood that if the Secretary should, after full and careful evaluation, and after completion of the Environmental Impact Statement required by the National Environmental Policy Act, decide to grant the necessary permits, *nothing in this conference report is intended to, nor should be construed in any manner to limit, diminish, or condition the Secretary's existing authority to*

[83] Plaintiffs' Memorandum at 3.

take any action required to implement this decision.[54] (emphasis added)

d. The SLUP Power Would Be Justified as an Implied Power Under § 28 of the Mineral Leasing Act

Far from limiting the Secretary's revocable permit authority, §§ 28 and 32 of the Mineral Leasing Act provide an independent basis for it, sufficient to sustain the permits sought here[55] even if they were not authorized pursuant to the Secretary's general land management powers.

In a subsequent section (*infra*, at 67) we discuss the well-established implied power of the Secretary to include necessary facilities within a right-of-way as an implied authority. The principle involved is that Congress must have intended § 28 to include all those facilities and uses of land necessary to secure the central objective of allowing pipeline construction.[56]

The necessity of additional space for construction has been demonstrated.[57] Such additional construction space is no less necessary to the ultimate purpose of achieving an operable pipeline than a pumping station. It is simply a form of necessary use which comes earlier in time, and it does not require a continuing grant, affecting title, in order to effectuate § 28's purpose. It is, in fact, a form of access to the principal right-of-way, and implied rights of access have long been recognized.[58]

While such additional space might well be granted as a right-of-way, on the theory that any land which the pipe-

[54] H. Rep. 92-746, 92d Cong., 1st Sess., 46 (1971).

[55] Section 32 (30 U.S.C. § 189) authorizes the Secretary "to prescribe necessary and proper rules and regulations and do any and all things necessary to carry out and accomplish the purposes of [the Mineral Leasing Act]."

[56] *Infra*, at 72.

[57] *Supra*, at 7-19, 40-44.

[58] *See Russell* v. *Sebastian*, 233 U.S. 195 (1914); *City of Davenport* v. *Three-Fifths of an Acre, More or Less*, 252 F.2d 354, 356 (7th Cir. 1950).

line activity actually uses is allowed,[59] there is no requirement to do so. Interpreting such implied power as no greater than necessary to achieve the purpose of the provision from which implied[60] would justify the granting of a revocable permit, to be revoked when use of the land for construction is no longer required.[61]

e. The Amount of Space Requested by Alyeska Is Reasonable

The uses sought by Alyeska have all the required characteristics of temporariness and revocability. Moreover, these uses reflect a reasonableness and proportion to the legitimate needs of the project which we believe go far toward justifying the permit. We will not repeat here the detailed discussion of pipeline practices set forth, *supra*, at pages 7-19, 40-44. That discussion more than adequately demonstrates the practical necessity and reasonableness of the Alyeska request. The need to maneuver multiple pieces of large equipment, to string and weld pipe, to ditch or build above ground supports, to store the earth removed from ditch and cuts—and the need to provide slopes which will be stable and capable of revegetation—all these needs are amply justified.

In short, to the extent they were not already provided for as necessarily implied in the right-of-way easement itself, Alyeska's land utilization plans serve in the most direct way the "special purposes not specifically provided

[59] *See* the remarks of Representative Chandler, 56 Cong. Rec. 7098 (1918), quoted *infra*, at 70-71.

[60] *Cf. Yates* v. *Gulf Oil Corp.*, 182 F.2d 286 (5th Cir. 1950); also, *McCullough* v. *Maryland*, 17 U.S. (4 Wheat.) 159 (1819).

[61] The Secretary's regulations provide that SLUPs may be issued only for "special purposes not specifically provided for by existing law." 43 C.F.R. § 2920.0-2(a). This has been construed not to bar a SLUP unless authority is available to provide an identical use. Solicitor's Opinion, 59 I.D. 313 (1946) (SLUP authorized to private applicants for recreational use, where statute authorized lease to government agency for same use). *Accord*, *Alfred E. Koenig*, 78 I.D. 305 (1971) (SLUP not authorized for non-exclusive road to mineral claim, where identical use provided under implied necessity doctrine).

for by existing law" which the SLUP power of the Secretary of Interior is designed to facilitate. Every measure planned is closely related to the goals of pipeline integrity, environmental protection, personnel and equipment safety, and employment of common construction equipment and techniques. There is no planned use of space that is not reasonably necessary for proper construction of the pipeline. The future value and usefulness of the SLUP land is not threatened by the work which will take place upon it. That portion of the gravel pad which will extend into the SLUP area will be removed at any time the government wishes. Once construction work is completed, the working space can be reduced so that no regular operations or maintenance will need to be accomplished beyond the statutory right-of-way limits. These matters will be wholly within the discretion of, and controlled by, the appropriate government officers.

EXCERPT FROM BRIEF OF APPELLEE ALYESKA PIPELINE SERVICE COMPANY COVERING NATIONAL ENVIRONMENTAL POLICY ACT ISSUES, PP. 6-36

II. STATEMENT OF FACTS

A. PRE-NEPA CHRONOLOGY

1. Discovery of Oil and Early Efforts To Develop Transportation System

During the period 1964 through 1967, the State of Alaska sold leases to various oil companies for oil exploration and development on a total of 900,000 acres of State land on the North Slope of Alaska. Operating under these leases, the oil companies began exploratory work.

In January 1968, a major oil field was discovered at Prudhoe Bay on the North Slope of Alaska, 200 miles north of the Arctic Circle. Shortly after the Prudhoe Bay discovery, Atlantic Richfield Company and Humble Oil and Refining Company initiated comprehensive feasibility studies to determine the best method for moving the oil to market.

In July 1968, these companies engaged Pipeline Technologists, Inc. (Pipe Tech), a pipeline engineering consulting firm, to make a study of the feasibility of a pipeline system from Prudhoe Bay to the southern coast of Alaska. Pipe Tech obtained the necessary permits from the Department of Interior to make surveys for use in their study. In October 1968, Pipe Tech completed the study, concluding that a secure pipeline could be constructed, operated and maintained.

A task force also investigated the economic and technical feasibility of a 3000 mile pipeline route to Chicago, extending across the North Slope and paralleling the Mackenzie River Valley. The results of this investigation were received in December 1968.[1]

Late in 1968, Atlantic, Humble and BP Pipe Line Corporation formed the Trans Alaska Pipeline System (TAPS) for the purpose of developing plans for and constructing a pipeline. After comparing and analyzing the reports, in February 1969, TAPS announced the decision to construct a pipeline to the southern coast of Alaska. Thereafter, meetings were held between Bureau of Land Management (BLM) personnel and representatives of the pipeline companies. Information from these meetings was compiled and transmitted to the Alaska State Director of BLM and the Bureau Director in Washington. In April of 1969, BLM District Offices in Alaska issued exploratory permits subject to certain stipulations.[2]

2. Appointment of Federal Task Force

Also in early 1969, the Secretary of Interior established a Task Force on Environmental Protection of Arctic Alaska ("North Slope Task Force") composed of representatives of seven Department of Interior bureaus and

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[1] Admin. Rec.* 1.1.4.1.2.

[2] Supporting documents, Vol. 4, Tabs 13 and 14.

offices.[3] This Task Force was charged with the dual responsibilities of assuring orderly development of federally-owned lands on the North Slope and also assuring protection of the environment. Interior Under Secretary Russell E. Train was designated chairman.

President Nixon applauded the Secretary's initiative and emphasized "it is urgent that we consider now the ways in which we can explore and develop, without destruction and with minimum disturbance, the oil resources of Northern Alaska."[4] At the President's suggestion, the Task Force was expanded to include representatives from the Departments of Commerce, Defense, Health, Education and Welfare, and Transportation. Also added were representatives of the Department of Housing and Urban Development, the Office of Science and Technology, the National Science Foundation, and the Office of Management and Budget.[5] The enlarged Task Force was designated the "Federal Task Force on Alaskan Oil Development." Representation from an *ad hoc* conservation-industry committee was also added.[6] A coordination and consultation group associated with the Task Force included representatives from the State of Alaska, Federal Field Commission, AEC, Department of Agriculture (Forest Service), University of Alaska, Army Corps of Engineers, and Navy Office of Naval Research.[7]

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[3] Horton affidavit* at 2. The participating bureaus and offices were: Bureau of Land Management, Bureau of Sport Fisheries and Wildlife, Bureau of Commercial Fisheries, Bureau of Indian Affairs, U.S. Geological Survey, Federal Water Pollution Control Administration, and Science Advisor to the Secretary. Senate Pipeline Hearings* at 98.

[4] Memorandum from the President to Secretary Hickel, May 9, 1969, supporting documents, Vol. 4, Tab 17.

[5] Horton affidavit* at 2-3.

[6] *Id.* The co-chairmen of this committee were John L. Hall, Assistant Executive Director of the *Wilderness Society*, and Richard E. Dulaney, Chairman of TAPS. Senate Pipeline Hearings* at 98 n.2.

[7] Senate Pipeline Hearings* at 98.

3. Early Briefing of Environmental Organizations

On May 8, 1969, Under Secretary Train held a briefing for a number of conservation organizations, including *The Wilderness Society*, the Sierra Club and the Izaak Walton League. At the briefing, the Under Secretary described the proposed pipeline system and the Department of the Interior's responsibilities and proposed approach. It was made clear that the Department was keeping its full range of options open.[8]

4. Application for Pipeline Right-of-Way

On June 6, 1969, a formal application for a pipeline right-of-way was filed by Atlantic, Humble and BP, as principals of TAPS.[9] The application described a preliminary alignment from a point near Prudhoe Bay to a point near Valdez, and requested prompt favorable action. On June 27, 1969, Secretary Hickel responded that no permit would be issued until all requirements of law and regulation had been met, until the Department was satisfied that the interests of the Native peoples of Alaska had been safeguarded, and until it could be demonstrated that environmental values would be adequately protected.[10]

Later in 1969 a revised pipeline right-of-way application was submitted by the original three companies and five additional companies which had joined the original three.[11] Applications were also filed for special land use permits for additional temporary construction space and for a haul road north of the Yukon.[12]

5. Questions Submitted to Applicant

On June 10, Under Secretary Train submitted seventy-nine questions to TAPS covering such matters as ecological

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[8] Supporting documents, Vol. 3, Tab 24.

[9] Admin. Rec.* 1.1.1.2. The application was filed pursuant to § 28 of the Mineral Leasing Act, 30 U.S.C. § 185.

[10] Exh. 10 to Horton affidavit*, supporting documents, Vol. 5, Tab 18.

[11] Supporting documents, Vol. 5, Tab 20.

[12] Supporting documents, Vol. 5, Tabs 21 and 22.

and technical information and the choice of Valdez for the terminal site. These questions were answered in detail, including a discussion of other terminal sites investigated and the reasons for selection of Valdez.[13]

6. Environmental Stipulations

Shortly after enlargement of the Task Force, its chairman visited Alaska to discuss the proposed project, and as a result of this visit, directed that stipulations be developed to protect the environment. An interdisciplinary study team of selected personnel was assigned to develop draft environmental stipulations. Working on this project, in addition to the Federal Task Force on Alaskan Oil Development, were nine Department of Interior agencies in Alaska, State of Alaska agencies (Departments of Fish and Game, Natural Resources, and Highways), the Corps of Engineers, and the Federal Field Committee.[14]

A first draft of the Stipulations was completed on July 18, 1969.[15] As described by the then Assistant to the Secretary of Interior and Executive Secretary of the Federal Task Force on Alaskan Oil Development, the Stipulations were "designed to provide the fullest possible protection for the integrity of the Alaskan environment and for the rights of Alaska Natives."

> The intent of the stipulations has been to maximize the safety of arctic pipeline construction and to minimize environmental degradation. . . . They incorporate a unique redirection of the traditional focus of Federal control from engineering specifications to protection of the environment. They are considered by the Department as providing the strictest supervision ever imposed upon a privately constructed project. Under them it is the prerogative of the United States Government to:
>
> (1) require modification of the alignment and installation of the pipeline system;
>
> (2) require rehabilitation of any property, resource, or land harmed by any pipeline activity;
>
> (3) revise or amend the stipulations, as necessary, to adjust to unforeseen conditions;
>
> (4) suspend or terminate any or all activities if and when any of the terms and conditions of the permit are not met.
>
> In content, the stipulations provide strict safeguards for the protection of Federal lands from pollution, erosion and human negligence, as well as setting forth safeguards for fish and wildlife and the interests of Alaska natives. . . . [T]he Department considers them a landmark in the development of environmental management in the United States.[16]

The proposed Stipulations were edited and refined by the Task Force and made available to a large number of conservation organizations and other individuals who had expressed interest in the matter.[17] On August 29 and 30, the Department of Interior held a public hearing in Fairbanks, Alaska, on the proposed Stipulations.[18] TAPS made a complete presentation of its plans for the pipeline, including the route and plans for protection of the environment. Representatives of numerous conservation groups, citizens of Alaska, and public officials, including the Governor of Alaska, were heard.

7. Formulation of Menlo Park Working Group

During the course of the hearing, Under Secretary Train announced the formation of a special governmental study group under the leadership of Dr. William Pecora of the

[13] The questions and answers, and accompanying correspondence, are set forth at pages 83-98 of the Senate Pipeline Hearings.* These pages are included in supporting documents, Vol. 4, Tab 28. *See* Admin. Rec.* 1.1.2.1.

[14] Horton affidavit* at 14; Senate Pipeline Hearings* at 77.

[15] *See* Exh. 1 to Horton affidavit*, supporting documents, Vol. 5, Tab 17.

[16] Horton affidavit* at 16-17.

[17] *Id.* at 10; Exh. 11 to Horton affidavit*, supporting documents, Vol. 5, Tab 19.

[18] The Fairbanks hearing transcript and exhibits are contained in the Admin. Rec.* 4.1.1 and 4.1.2.

United States Geological Survey.[19] This group, informally called the Menlo Park Working Group, went immediate session, working initially on problems of construction in permafrost.[20]

8. Lease Sale

In September of 1969, another lease sale was held and the State of Alaska obtained from a number of oil companies bonuses totaling $900 million on leases covering an additional 450,000 acres on the North Slope.[21] The leasehold agreements provide for the State to receive a 12½ percent royalty on the gross wellhead value of oil and gas production from the leaseholds.[22]

9. Coordination with Congressional Committees

In the latter part of 1969, the Senate and House Interior Committees were kept fully advised of all matters relating to the project.

Early in 1969, by Public Land Order 4582, all unreserved public lands in Alaska had been withdrawn pending determination of Alaskan Native land claims.[23] On July 29 the Secretary of Interior notified the House and Senate Interior Committees that he proposed to modify the land freeze order to permit construction of a highway between the town of Livengood and the Yukon River.[24] There was no congressional objection to this action,[25] and the modification was ordered on August 13, 1969.[26] Thereafter, the State of Alaska, under R.S. 2477, 43 U.S.C. § 932, took a

[19] Admin. Rec. 4.1.1 at 88-89. Dr. Pecora subsequently became Under Secretary of the Department.

[20] *Id.* at 261. Members are identified in the Sanger dep.* at 95-98.

[21] Exh. 1 to Horton affidavit,* supporting documents, Vol. 5, Tab 17.

[22] Admin. Rec.* 3.1 at 58.

[23] 34 Fed. Reg. 1025 (1969), supporting documents, Vol. 4, Tab 1.

[24] Supporting documents, Vol. 4, Tab 20.

[25] Supporting documents, Vol. 4, Tabs 16 and 18.

[26] Public Land Order 4676, 34 Fed. Reg. 13415 (1969), supporting documents, Vol. 4, Tab 2.

right-of-way from Livengood to the Yukon River and the three above-named companies, as contractors for the State, constructed the State highway.[27]

On September 8 and 9, 1969, TAPS made presentations to the House and Senate Interior Committees similar to that made in Fairbanks to the Department of Interior.[28]

The Stipulations were finalized and signed by the Secretary in mid-September, and on September 30, copies were sent to the Commitees.[29] Hearings were held on the Stipulations and related matters in October and representatives of numerous conservation organizations testified.[30]

The Secretary also sent the Committees a draft of a proposed modification of Public Land Order 4582 which would allow the Department to grant a pipeline right-of-way from Prudhoe Bay to Valdez.[31] On October 23, 1969, the Chairman of the Senate Committee posed a number of questions to the Department regarding the proposed pipeline; answers were received on Novmber 20.[32]

[27] *See* letter from Alaska State Dept. of Highways to Alyeska, supporting documents, Vol. 4, Tab. 15. In 1969 and again in 1970, the State of Alaska opened an ice road (winter trail) from Fairbanks to Sagwon on the North Slope. This road started near Livingood and traversed via Stevens Village, Bettles, and Anaktuvuk Pass to Sagwon. This winter trail was used by TAPS contractors in their road mobilization effort.

[28] Senate Pipeline Hearings* at 2-36; House Pipeline Hearings.*

[29] Senate Pipeline Hearings* at 80. The Stipulations are set forth on pages 39-77 of the Hearing record and are included at Admin. Rec.* 2.9.1.

[30] Senate Pipeline Hearings* at 173-252, 265-272.

[31] *Id.* at 80. The proposed modification also would authorize the granting of additional rights-of-way and other permits "reasonably necessary or convenient for the construction, maintenance, or operation of the oil pipeline system," and the sale of forest products and mineral materials. *Id.* at 37-38.

[32] *Id.* at 285-294.

On December 11 and 16, respectively, the Senate and House Committees advised the Secretary that they had no objection to the proposed modification of the land freeze order.[33] Both Committees expressed approval of the approach taken in the proposed Stipulations.[34] Subsequently, Secretary Hickel signed the proposed modification of the land freeze order[35] and BLM issued mobilization authority allowing five road construction contractors to develop construction camps and mobilize for construction of the road north of the Yukon River.[36] Environmental Stipulations were attached to all permits and BLM officials monitored activities in the field to assure compliance.[37]

B. POST-NEPA CHRONOLOGY

1. Appointment of Technical Advisory Board

The National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. § 4321 *et seq.*) became effective on January 1, 1970. On February 20, 1970, the Secretary of the Interior appointed a Technical Advisory Board to advise the Interior Task Force and the Secretary on geologic factors, terrain suitability, and engineering design criteria needed by the Department as a prerequisite to issuance of a right-of-way and permits for the pipeline system.[38] The Board included personnel from the U.S. Geological Survey (USGS), Cold Regions Research and Engineering Laboratory of the U.S. Army Corps of Engineers (CRREL), BLM, and the Federal Water Pollution Control Administration. The Director of USGS was named chairman.

[33] Supporting documents, Vol. 4, Tabs 32 and 33.

[34] *Id.*

[35] Public Land Order 4760, 35 Fed. Reg. 424 (1970), supporting documents, Vol. 4, Tab 3.

[36] *E.g.*, Interior Permit Nos. 50020-SPO-5, 50020-SPO-8, F-12624.

[37] Senate Interior Appropriations Hearings for FY 72* at 136.

[38] Horton affidavit* at 21-22.

2. Incorporation of Menlo Park Working Group

Soon thereafter, the Chairman of the Technical Advisory Board incorporated, as a formal adjunct to the Board, the Menlo Park Working Group which had been established the preceding August. The charge to the Working Group was to perform detailed analyses of technical information submitted by TAPS and to supply the results of their evaluations to the Technical Advisory Board for consideration and advice to the Secretary. As collateral duties, the members of the Working Group were to carry out field investigations, conduct research projects, and prepare reports on subjects pertinent to the pipeline project.

3. Information Obtained from TAPS

In February 1970, a series of formal reports were submitted by TAPS to the Working Group. After a careful study of the report and after several exchanges of memoranda, the Working Group posed a series of 13 detailed questions to TAPS.[39] Topics covered included: soil stability, differential settlement, pipeline foundations, erosion control, seismic design, river scour depth, drainage patterns, computer thermal analysis, temperatures used for design, pipe characteristics, valves, pump stations, pipe corrosion, construction procedures, and monitoring and operations. In December answers were submitted by Alyeska (which had been formed in August 1970 to replace TAPS).[40]

During 1970, in a continuing effort to establish baseline data upon which technical and environmental evaluations could be made, the Department authorized the consortium to conduct soil explorations; surveys for material sites, communication sites, and route alignments; and centerline and profile surveys of the proposed pipeline and roads. This action was reported to Congress.[41]

[39] Admin. Rec.* 1.1.2.2.

[40] *Id.*

[41] Senate Interior Appropriations Hearings for FY 72* at 136-137.

4. Drafting of Technical Stipulations

In November of 1970, following several months of consultations and meetings with the company, the Working Group met to draft Technical Stipulations to complement the Environmental Stipulations issued in September 1969.[42] These Stipulations set forth the basic design and construction standards for the pipeline system.

5. Draft Environmental Impact Statement

On January 15, 1971, the Department of Interior published a "Draft Environmental Impact Statement for the Trans-Alaska Pipeline."[43] Agencies participating in the preparation of this Draft Statement included the Department of Interior's: Bureaus of Land Management, Indian Affairs, Sport Fisheries and Wildlife; the Geological Survey, the Office of Oil and Gas, and the Office of the Science Advisor; and the Environmental Protection Agency's Water Quality office.

The Draft Statement consisted of approximately 200 pages—substantially more detailed than any previous impact statement drafted by a federal agency pursuant to NEPA. The Statement contained: a description of the proposed pipeline system, a description of the Alaskan environment, an evaluation of the project's likely environmental impact, a discussion of alternatives, and a discussion of the benefits which would be derived from approval of the permits. The evaluation of the environmental impact[44] covered the following topics:

human resources (population, communities, culture, and recreation)
land use
fish and wildlife resources
vegetation resources

[42] Attachment to Draft Impact Statement, Admin. Rec.* 2.13.

[43] Admin. Rec.* 2.13; *see* 36 Fed. Reg. 622 (1971).

[44] Admin. Rec.* 2.13 at 101-150, 168-196.

water and air resources
geologic resources
transportation systems
power systems

A wide variety of alternatives were discussed,[45] including: modifications of the pipeline system as proposed; alternative routes (including trans-Canada); alternative transportation modes (such as icebreaking tankers, submarine tankers, a railroad, other forms of surface transportation, and airborne vehicles); and alternative energy sources.

6. Public Hearings on Draft Statement

At the same time the Draft Statement was made available, copies of the draft were sent to ten federal agencies,[46] and public hearings on the draft were scheduled for both Alaska (Anchorage) and Washington, D.C.[47] State and local agencies, other public agencies, and interested members of the public, organizations, and Alaskan Native villages were expressly invited to comment on:

1. The environmental impact of the proposed action;
2. Any adverse environmental effects which cannot be avoided should the proposal be implemented;
3. Alternatives to the proposed action;
4. The relationship between local short-term use of man's environment and the maintenance and enhancement of long-term productivity; and
5. Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[48]

Testimony was also invited on "such other environmental aspects of the proposed action as the witness deems appropriate." In addition, persons not able to attend either

[45] *Id.* at 151-167, 179-185.

[46] Final Env. Stmt.,* Vol. 6 at 2.

[47] 36 Fed. Reg. 622 (1971), supporting documents, Vol. 4, Tab 7.

[48] *Id.*

hearing, or persons wishing to supplement oral presentations, were given until March 8, 1971 to submit written statements for inclusion in the hearing record.[49] The time for filing supplementary statements was subsequently extended to March 22, 1971.[50]

At the opening of the hearings, the Secretary indicated that the draft would undergo substantial revision and invited the public to participate in the examination process.[51] He stated that he had directed that "every effort be expended to present the final document in an objective, carefully weighed and balanced discussion of the environmental impact of the proposed project." In particular, he directed the drafters of the final document "[1] to elaborate upon their treatment of the environmental impact of tanker transport from the Gulf of Alaska to the Puget Sound area, [2] to more carefully delineate the long-term impact of the construction upon the culture of the Alaskan Natives and [3] to expand upon their examination of alternatives to the proposed action." [52]

A total of 297 witnesses testified at the hearings. The verbatim transcripts of both hearings filled 10 volumes and totaled more than 2000 pages. In addition, over 4000 pages of additional statements were submitted for the record, and 3600 pages of written submissions were received after the hearing and prior to March 22.[53] Approximately 505 persons made oral or written presentations. In addition to some 70 federal, state and local governmental officials, about 435 private citizens commented on the project, most on their own behalf and some on behalf of organizational or corporate interests. Among the private citizens were

[49] 36 Fed. Reg. 947 (1971).

[50] 36 Fed. Reg. 4435 (1971).

[51] Admin. Rec.* 4.2.1.1 at 4.

[52] *Id.* at 6.

[53] Final Env. Stmt.,* Vol. 6 at 2.

190 people with specialized scientific expertise, including many with engineering, geological and biological backgrounds. Fifty-nine witnesses testified or filed submissions as representatives of environmental organizations; 15 represented civic organizations; 38 represented business interests; and 12 represented Alaskan Native groups.[54]

Of the 505 people providing oral or written submissions, approximately 230 expressed opinions favoring the proposed project;[55] about 222 disapproved of the project;[56] and 53 expressed no opinion either for or against.

The issues raised at the hearings and in the subsequent submissions included virtually every issue ever raised concerning the pipeline proposal. A compilation of brief summaries of just the issues presented by those opposing the project—with duplicative comments by different witnesses omitted—fills a volume of nearly 300 pages.[57]

[54] *See* statistics on hearings witnesses, supporting documents, Vol. 4, Tab 24. A few individuals testified at both hearings or filed later written submissions in addition to their oral testimony. Accordingly, the numbers given here involve a small degree of duplication and thus are approximate figures.

[55] 197 wholly favored the proposal and 34 expressed favorable sentiments with certain reservations. *Id.*

[56] 129 were wholly opposed and 93 were generally opposed but indicated willingness to consider the matter further upon certain stated conditions. *Id.*

[57] Supporting documents, Vol. 1. Comments covered: project design; tanker transport; impact on human resources; fish and wildlife; vegetation; water and air resources; geologic resources; impact of seismicity and oil spills; U.S. energy needs; alternative energy sources; non-development of North Slope oil; deferral of development; reduction of energy consumption; balance of payments; national security; economic benefits; maritime benefits; pipeline route, including trans-Canada routes and their common corridor aspects; alternative means of transportation; modifications of proposal; State of Alaska control over system; NEPA requirements and procedures; Stipulations; problems relating to the North Slope; international matters; other applicable laws; and land use planning.

Nine federal agencies and bureaus provided comments on the Draft Statement:[58]

Office of Emergency Preparedness
Federal Power Commission
Department of Defense
Department of Agriculture
Environmental Protection Agency
Department of Transportation
Department of Commerce
Department of Health, Education and Welfare
National Park Service

7. Project Description and Other Submissions by Alyeska

Following the hearings, the Department of Interior requested Alyeska to provide additional technical information on the project. Over the next several months, Alyeska prepared a comprehensive description and in July and August of 1971 Alyeska submitted to the Department its "Project Description of the Trans Alaska Pipeline System."[59] Copies were also furnished to plaintiffs and to the Canadian Embassy in Washington, D. C.

The Project Description consisted of three volumes of text numbering approximately 1350 pages, and 26 volumes of appendices, which included detailed descriptions, specifications, studies, and sketches and drawings. The Description contained sections on the pipeline, roads, airfields, pumping stations, terminal facilities, telecommunications, construction mobilization and support, testing and start-up, operation and maintenance, and contingency planning for oil spills. Detailed descriptions were given of the design, equipment, construction procedures, and special environmental measures. Many studies conducted by Alyeska and

[58] These comments are included at pages A-1 to A-107 of Volume 6 of the Final Environmental Impact Statement.

[59] Admin. Rec.* 1.1.2.3.

its consultants, dealing with a wide variety of topics,[60] were included in the appendices to the Project Description.

Because the Project Description was so voluminous, in early September Alyeska also submitted to Interior a 64-page Summary of the Project Description, with maps and diagrams.[61] Included in the Summary is a subject index to both the Summary and the Project Description.

In July 1971, Alyeska provided to Interior a description of the anticipated marine transport system between the Valdez terminal and West Coast ports.[62] This submission included information on the design and operation of the ships, oil loading and discharge operations, voyage description, contingency oil-spill plans, port navigation system, handling of ballast, and environmental impact. An additional submission in September 1971 responded to Interior's request for further information and clarification of certain aspects of the marine transport system.[63]

Also in September, Alyeska submitted to Interior the so-called "ARCO Memorandum,"[64] which summarized seven

[60] Included were studies and reports on such matters as: the design for a sample river crossing; special design at the Denali fault; thaw plug stability; pipeline foundation design; thermal analysis; thaw settlement and pipe bending; seismic design; detailed design for a sample section of the alignment; subsurface soil investigation; materials sources; landslides; flood hydrology of glacier-dammed lakes; road drainage; waste disposal; pumping station design; properties of the pipe; welding tests; environmental data; pressure control; storage tank design; ballast treatment facilities; revegetation; and oil spills and cleanup. A list of approximately 250 studies and reports prepared by Alyeska is included in Alyeska's Response to Interrogatories, April 24, 1972, supporting documents, Vol. 5, Tab 14. *See* Admin. Rec.* 1.1.4.3.

[61] Admin. Rec.* 1.1.2.4; supporting documents, Vol. 7.

[62] Admin. Rec.* 1.1.3.1.

[63] Admin. Rec.* 1.1.3.2.

[64] Admin. Rec.* 1.1.4.1; supporting documents, Vol. 2, Tabs 1-15.

detailed investigations of a possible trans-Canada pipeline system and discussed some of the environmental, economic and international aspects. The seven studies were submitted along with the Memorandum.

8. Interior Review of Project Description

Approximately 60 copies of the Project Description were distributed to an Ad Hoc Review Group of the Technical Advisory Board and the Menlo Park Working Group and to other interested federal and state government officials.[65] During August and September, 1971, the Ad Hoc Review Group, consisting of about 28 scientists and engineers from several government agencies undertook an exhaustive review of the Project Description.[66]

This review resulted in 156 specific technical comments or questions covering every phase of the project. The technical comments, and additional comments by the Technical Advisory Board and the Under Secretary, were transmitted to Alyeska on October 7, 1971.[67] Although the Project Description was characterized as "a significant step forward," additional information was requested and constructive criticism was provided which was "intended to lead to a revised document that satisfies the Department of Interior requirements to insure that any system authorized would be structurally secure and environmentally acceptable." [68]

[65] Final Env. Stmt.,* Vol. 6 at C-89, C-92 to C-93.

[66] *Id.* at C-89.

[67] *Id.* at C-87 to C-143.

[68] *Id.* at C-97. Topics covered by the technical comments included: seismic design, above and below ground construction modes, pumping station design, river crossings, cathodic protection, pipe insulation, bridge design, valve locations, gravel requirements, alignment criteria, inspection and monitoring procedures, construction procedures, compliance with Stipulations, thermal erosion control, access roads, cuts through permafrost, highway design, ballast treatment effluent, tsunami, communications system, leak detection, floods, thaw plug stability, differential settlement, gas line, drainage, maximum spill, waste treatment, air pollution, noise pollution, avalanche protection, and lightning protection. *See* table of contents to Alyeska's Responses to the Technical Comments* reproduced at supporting documents, Vol. 4, Tab 30.

Alyeska responded to each of the 156 technical comments, in a series of lengthy submissions during October-December, 1971.[69] Each of the responses was evaluated by the Technical Advisory Board and found to be acceptable for purposes of assessing environmental impact. The evaluation was transmitted to the team engaged in drafting the Final Environmental Impact Statement.[70]

9. Preparation and Release of Final Impact Statement

Shortly after the hearings on the Draft Impact Statement, a "102 Statement Task Force" was established by Interior to analyze the information submitted in response to the draft, to take whatever steps were necessary to obtain additional information, and to prepare the Final Environmental Impact Statement.[71] The Task Force was divided into three smaller Task Forces organized to deal with "the environment and impacts along the proposed land route (Task Force A), along the proposed marine route (Task Force B), and with the abiotic framework of alternative routes through Canada (Task Force C)." [72] Altogether, the "102 Task Force" included about 60 biologists, geologists, economists, and others, representing twelve Interior bureaus and offices and nine other federal departments and agencies.

Among those drafting the Final Statement, the following

[69] Admin. Rec.* 1.1.2.7.

[70] *See* Sanger dep.* at 100-101; Final Env. Stmt.,* Vol. 6 at C-148 to C-204.

[71] Final Env. Stmt.,* Vol. 6 at 4-5.

[72] *Id.* at 4.

fields of specialization were represented by one or more individuals:[73]

Anthropology, cultural
Archaeology
Biology, marine
Botany
Chemistry, plant
Climatology
Economics
—Land use
—Population resources
—Urban development
—Agriculture and Forestry
—Transportation
—Petroleum demand and consumption
Engineering
—Geological
—Hydrological
—Pipeline
—Seismic
Geology
—Coastline and marine
—Geological engineering
—Geomorphology
—Geophysics
—Mineralogy
—Seismology
Hydrology
Ichthyology
—Freshwater fisheries
—Marine fisheries
Oceanography
—Physical
—Biological
—Chemical
Ornithology
Zoology
—Marine mammals
—Large terrestrial mammals
—Small terrestrial mammals

[73] *See* table at supporting documents, Vol. 5, Tab 23.

David A. Brew was designated chairman of the 102 Statement Task Force. In a series of memoranda, he provided guidance to the Task Forces as to the standards and procedures by which they should assess the project's environmental impact.[74] Dr. Brew's memorandum of October 13, 1971, to the members of Task Forces A and B sets forth the methodology used in assessing the environmental impact of the proposed project:

> The methodology being utilized in this environmental impact analysis is based on a "general case" approach, in which a specific approach is designed for the specific environment and project at hand. This methodology requires systematic description of the environment, systematic description of the impacting project, identification and classification of sensitive elements of the environment, identification and classifiction of impacting factors inherent in the project, analysis of the interrelationships between the sensitive environmental elements and the impacting factors (including indirect and secondary feedback-type relations), prediction of the net effects of those relationships, and finally preparation of an environmental impact report describing the results of the impact analysis.[75]

Dr. Brew cautioned that the Final Statement must "properly accommodate all substantive comments and criticisms that were raised in the government agency review of the draft 102 statement and in the public hearings that were held on the draft statement."[76] Brew instructed the Task Forces to be as objective as possible:

> . . . [P]lease remember that our goal is an objective, rigorously-derived impact statement that is scientifically, technically, and legally defensible. As part of this, avoid statements that could be construed as advo-

[74] A number of these guidance memoranda are included in the Final Statement, Vol. 6 at C-1 to C-78.

[75] Final Env. Stmt.,* Vol. 6 at C-28.

[76] *Id.*

cative of any point of view and be prepared to defend all of your statements on the witness stand.[77]

Task Force A, charged with evaluating environmental impact along the pipeline right-of-way, was the largest of the Task Forces. It included representatives from seven Department of Interior bureaus (Indian Affairs, Sport Fisheries and Wildlife, National Park Service, Geological Survey, Office of Oil and Gas, Land Management, and Outdoor Recreation) and also five non-Interior agencies (Department of Commerce, Department of Transportation, Environmental Protection Agency, Water Resources Council, and the Corps of Engineers).[78] This group first developed a systematic description of the existing environment along the pipeline route. Then, following receipt of Alyeska's Project Description, it evaluated the impact of the proposed system on the environment. As further technical submissions were received from Alyeska, evaluations of those submissions were supplied to the Task Force by the chairman of the Technical Advisory Board and used in its analysis. The results of the Task Force's work are contained in Volumes 2 and 4 of the Final Environmental Impact Statement.

Task Force B was charged with evaluating impact along the marine segment of the proposed system. The composition of the Task Force permitted it to rely heavily on its own expertise. Included, in addition to Department of Interior personnel, were representatives of the Coast Guard, the National Oceanic and Atmospheric Administration, National Marine Fisheries Service, National Oceanographic Survey, Water Resources Council, Environmental Data Service, Environmental Protection Agency and the Corps of Engineers.[79] The experience of these agencies in

[77] *Id.* at C-2.

[78] Final Env. Stmt.,* Vol. 6 at 4.

[79] *Id.* at 4-5.

evaluating marine transportation systems and in assessing the impact of tanker traffic on the marine ecosystem was utilized in developing the Final Statement.[80]

Task Force B analyzed Alyeska's marine submission and additional information submitted later at the request of the Task Force. It also had the benefit of submissions furnished by the Canadian government. In August 1971 the Canadian government tendered to the United States government an Aide-Memoire[81] expressing concern over the proposed tanker traffic in the Puget Sound region. Accompanying the Aide-Memoire were several evaluations of the impact potential on the marine ecology associated with the proposed system. Subsequently, an additional submission was received from Alyeska.[82] These documents, along with other information obtained from the public, were carefully considered during the review process. The product of Task Force B's efforts appears in Volumes 3 and 4 of the Final Statement.

Task Force C was charged with evaluation of alternative routes through Canada. When formed, it consisted solely of representatives from the U.S. Geological Survey. Subsequently it was expanded to include representatives of the Bureau of Sport Fisheries and Wildlife and the Bureau of Land Management.[83]

Task Force C examined all available research and studies on potential corridors for a trans-Canada pipeline. As a

[80] For example, the National Marine Fisheries Service provided baseline information on the marine ecosystem existing along the proposed navigation route. Brew dep.* at 127. The Coast Guard contributed a lengthy study on the potential for oil spillage along the proposed route and a critique on the effect of tanker traffic on the marine ecology. Admin. Rec.* 2.3. Information from these reports was incorporated into the Final Environmental Statement.

[81] Admin. Rec.* 2.1.5.1.

[82] Admin. Rec.* 1.1.4.6.

[83] Final Env. Stmt.,* Vol. 6 at 5.

result of this examination, a report was prepared in July 1971 describing the characteristics of these potential corridors.[84] Members of the Geological Survey and the Bureau of Sport Fisheries and Wildlife had conferences with their counterparts in Canada concerning the Canadian alternatives.[85] The Task Force used the "ARCO Memorandum" and attached studies, referred to above. (Additional actions in connection with evaluation of the Canadian alternative are described *infra* at 112 *et seq.* Task Force C's analysis appears in Volume 5 of the Final Statement.)

The Department's efforts in properly evaluating the environmental impact of the proposal were not only massive but comprehensive and detailed. The Department has estimated that the cost of these efforts was $9 million and 175 man-years.[86] Hundreds of individuals participated. Approximately 1300 studies, reports and other documents were utilized by the Department of Interior in the preparation of the Impact Statement.[87]

Throughout the preparation of the Final Statement, the Secretary maintained a close supervisory role over the process. Despite his many other duties and responsibilities, he met often with those in charge of the effort. During the final three months of preparation of the Final Statement, the Secretary tried to meet with Under Secretary Pecora several times each day. Every important aspect of the project was discussed at these meetings.[88] In addition, in the weeks just prior to publication of the Final Statement, the Secretary had approximately a dozen briefings

[84] Brew dep.* at 104-106; Admin. Rec.* 2.6.16.

[85] Brew dep.* at 113, 161-162; Horton dep.* at 140.

[86] Supporting documents, Vol. 4, Tab 26, and Vol. 5, Tab 9.

[87] See references listed throughout Final Impact Statement. For this purpose, Alyeska's many submissions have been counted together as one document.

[88] Morton dep.* at 55-56.

with Dr. Sanger, Dr. Brew, Dr. Vogely, and Mr. Horton.[89]

When the Statement was in next-to-final form all members of the Federal Task Force on Alaskan Oil Development were invited to read and comment on it.[90] The draft was also discussed with nine federal agencies.[91]

On March 20, 1972, after three years of reviewing the environmental implications of the pipeline system, the Department of Interior issued its "Final Environmental Impact Statement, Proposed Trans-Alaska Pipeline." Consisting of six volumes and approximately 2900 pages, the Impact Statement far surpassed any previous effort by a federal agency to assess the environmental impact of a project under its auspices or authority. The Department's appraisal of the existing environment alone took up 913 pages in two volumes[92] and its assessment of the impact of the proposed project on this environment covered more than 600 pages.[93] All reasonable alternatives were thoroughly discussed in a volume of approximately 500 pages.[94] The remaining 850 pages included: a description of the project and related systems;[95] the Stipulations on which the granting of the permits would be conditioned;[96] a review of the procedures followed in drafting the Final Statement, and of the comments provided by federal, state and

[89] *Id.* at 56.

[90] Final Env. Stmt.,* Vol. 6 at 7.

[91] Statement of Reasons* at 16. *See infra* at 124-25.

[92] Volumes 2 and 3.

[93] Volume 4.

[94] Volume 5.

[95] Volume 1 at 4-86.

[96] Volume 1, App. at 1-62. These Stipulatiions, by far the most stringent governmental requirements ever imposed on a project of this nature, are described *infra* at 50 *et seq.*

local agencies, and the public;[97] and a summary of the Department's evaluation of the project's environmental impact and the impact of alternatives.[98]

10. Economic and Security Analysis

In addition to the environmental impact analysis undertaken by Task Forces A, B, and C, a separate Task Force was established under the direction of Dr. William Vogely, Director of Interior's Office of Economic Analysis, to address issues of economics and national security. Specifically, this Task Force was asked to consider: petroleum supply and demand; the economics of alternative sources of energy, alternative sources of crude oil and alternative methods of bringing North Slope oil to market; impact of the various alternatives on the national security, the balance of payments, resource costs, and the merchant marine; economic impacts on the State of Alaska; and the size and distribution of costs and returns to various sectors.[99]

Evaluation of the various alternatives was aided by reports furnished by other federal agencies, other bureaus in the Department of the Interior and by private consultants.[100] The Defense and State Departments and the Office of Emergency Preparedness submitted to the Task Force their expert opinions on the need for North Slope oil and the national security implications of the proposed alternatives for delivering the oil to the lower 48 states.[101] The Council of Economic Advisers and the Treasury and Commerce Departments submitted information on the economic implications associated with North Slope oil development

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[97] Volume 6.

[98] Volume 1 at 87-322.

[99] Admin. Rec.* 3.3.1.

[100] Final Env. Stmt.,* Vol. 6.

[101] Admin. Rec.* 3.3.2 at M-1, M-2, M-5.

and alternative transportation systems.[102] The Department's Bureau of Mines, U.S. Geological Survey, and the Office of Oil and Gas contributed their expertise on energy supply and demand.[103] An analysis of future demand for crude oil was prepared for the Task Force by Professor Richard L. Gordon of Pennsylvania State University.[104] In considering the economic impact of the alternatives on the State of Alaska, in addition to submissions by the State, the Task Force utilized a study made by the Institute of Social, Economic and Government Research of the University of Alaska.[105] Considerable emphasis was directed toward the economic and national security implications of the trans-Canada pipeline alternative[106] and toward a broad class of energy alternatives.[107]

The review effort culminated in a three volume report entitled "An Analysis of the Economic and Security Aspects of the Trans Alaska Pipeline," which was released simultaneously with the Final Environmental Impact Statement. The report finds that development of North Slope oil as soon as possible is an important national objective and that a trans-Alaska pipeline is preferable to other transportation alternatives from the standpoint of national security, resource costs, impact on the merchant marine, and economic impact on the State of Alaska.[108]

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[102] *Id.* at K-3, M-3, M-4.

[103] *Id.* at J-3, L-2, L-3.

[104] *Id.* at L-1.

[105] Admin. Rec.* 3.3.1 at E-1. The study itself is included at Admin. Rec.* 3.1.

[106] *E.g.*, Admin. Rec.* 3.3.1 at C, H, I; Admin. Rec.* 3.3.2 at J-3.

[107] Admin. Rec.* 3.3.3.

[108] Admin. Rec.* 3.3.1 at 5-9. *See also infra* at 141, *et seq.*

11. Review of Final Statement

On the day the Final Impact Statement and Economic and Security Analysis were published, the Department of Interior published a "Notice of Availability" in the Federal Register.[109] In the notice the Department stated that the Final Statement would be available for public inspection at a number of locations. In addition, the public was informed how the Final Impact Statement, the Economic and Security Analysis and a Coast Guard oil spill study could be purchased. A list of other documents available for public inspection was provided. The notice stated that no action would be taken on the permit application before May 4, 1972.

In addition to the Federal Register notice, the Department took other steps to assure public scrutiny of the document.[110] More than two dozen sets of the full nine volumes were sent to interested members of Congress, ten sets were given to lawyers for the plaintiff environmental groups, 102 copies were made available to the press, and 585 copies were sent to depository libraries throughout the country. In all, 2,460 full sets were printed and distributed, or made available, to public officials, interested organizations, the press, and the public.

Pursuant to NEPA and the regulations promulgated thereunder, the Final Statement was immediately forwarded to the Council on Environmental Quality.[111] The 45-day period which the Secretary of Interior had provided prior to decision was two weeks longer than the period required by CEQ Guidelines and DOI regulations for CEQ review.[112]

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[109] 37 Fed. Reg. 5837 (1972), supporting documents, Vol. 4, Tab. 11.

[110] *See* supporting documents, Vol. 4, Tab 12.

[111] Ten copies were provided to CEQ. *Id.*

[112] Final CEQ Guidelines* § 10(b); DOI Manual* 516.2.9.C(3).

On the day following the publication of the Statement, the Secretary, in an interview on network television, invited further public comment on the trans-Alaska pipeline proposal. He stated that he "would like to hear from everybody who has something to say about it" and that if the public "will let us know what they think, we will incorporate these comments into the decision-making process."[113]

A significant number of people submitted comments on the proposed project. In addition to many letters simply indicating approval or disapproval of the proposal, the Department received a number of lengthy submissions. These included comments by environmental organizations, Alaskan Natives, Alaskan fishermen, the State of Alaska, Department of Environmental Conservation, business interests, and interested individuals. A major submission was filed by the environmental groups which are plaintiffs in this action. Comprising four large volumes, this submission included comments by approximately 60 individuals with engineering, biological, economic, legal, and other backgrounds.[114]

Officials of the Department reviewed all of the submissions received, analyzed them for significant new material, and prepared summaries of these documents for presentation by Under Secretary Pecora to the Secretary.[115]

As the comments were received by the Department, the Secretary discussed them with Dr. Pecora.[116] After the summaries of these comments were prepared, they were reviewed by the Secretary, and further consultations with Dr. Pecora were held.[117]

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[113] Supporting documents, Vol. 4, Tab 23.

[114] Admin. Rec.* 4.3.2.1.

[115] Admin. Rec.* 2.15; supporting documents, Vol. 4, Tab 21.

[116] Morton dep.* at 58-59.

[117] *Id.*

12. Decision-Making Process

In addition to reviewing the comments on the Final Impact Statement, the Secretary took other steps in final preparation for reaching his decision to grant or deny the permits. Primarily, he took measures to assure himself that the alternatives to the pipeline project had been fully evaluated.

Early in the 45-day review period, the Secretary directed Deputy Under Secretary Horton to have a document prepared which placed the trans-Canadian alternative in the most favorable light possible, in order to insure that the advantages of this alternative received appropriate consideration.[118] In accordance with the Secretary's instructions, a memorandum was prepared,[119] which the Secretary discussed with the Secretaries of State, Treasury, Transportation and Commerce, and with the President.[120] Indeed, the Secretary testified that he consulted with, and sought the advice of, the members of the Cabinet on numerout occasions during the decision period.[121]

Additional memoranda prepared for the Secretary included one prepared by Dr. Sanger on March 31, 1972, discussing the Mackenzie Valley alternative pipeline route and the extensions of the route south of Edmonton,[122] and an option paper, dated May 3, 1972, submitted by the Assistant Secretary for Program Policy discussing the choice of decisions open to the Secretary.[123]

Throughout this period, the Secretary met almost daily with Dr. Pecora to discuss alternatives and other aspects

[118] *Id.* at 24-27.

[119] Supporting documents, Vol. 2, Tab 23.

[120] Morton dep.* at 26-27.

[121] *Id.* at 60-62.

[122] Supporting documents, Vol. 2, Tab 20.

[123] Supporting documents, Vol. 2, Tab. 19.

of the project.[124] On May 10, 1972, the Secretary discussed his impending decision with the Administrator of the Environmental Protection Agency and the Chairman of the Council on Environmental Quality.[125]

On May 11, 1972, after full consideration of the proposal, its consequences, and the available alternatives, the Secretary of Interior anounced his intention to grant the permits for the proposed trans-Alaska pipeline system. In a 45 page "Statement of Reasons for Approval,"[126] the Secretary explained in detail his reasons for reaching this decision. After discussing the policies of the National Environmental Policy Act of 1969; the United States energy and crude oil posture; choice of market for the North Slope oil; the feasibility, timing and capacity, and economic and social consequences of the proposed trans-Alaska proposal; alternative methods of transporting the North Slope oil to market; and further deferral of action on the permits; the Secretary concluded that:

(1) The national interest requires the rapid development of North Slope oil;

(2) It is in the national interest to have a pipeline for the transport of North Slope oil under the total jurisdiction, and for the exclusive use, of the United States;

(3) Based on an evaluation of all factors, including national policy and the impact on the quality of the human environment that is both certain and threatened, the Alyeska proposal is, from the standpoint of the overall national interest, acceptable and preferable to any other alternative that has been suggested for transporting North Slope oil;

(4) Rejection of the Alyeska proposal or any further

[124] Morton dep.* at 29-30, 59-60.

[125] *Id.* at 37.

[126] Admin. Rec.* 6; supporting documents, Vol. 3, Tab 22.

delay in making a determination with respect to that proposal is not in the national interest;

(5) Approval of the proposal and granting the permits necessary therefor is in the national interest and is consistent with all the policies set forth by Congress, including those contained in the National Environmental Policy Act of 1969; and

(6) Approval of the State proposal is in the national interest as well as the interest of the State of Alaska and is consistent with all the policies set forth by Congress, including those contained in the National Environmental Policy Act of 1969.[127]

A list of documents containing information considered by the Secretary in reaching his decision is included in the Statement of Reasons* at 6-7.

13. Congressional Review of the Secretary's Decision

One week after the Secretary's decision, following three years of study of the proposal by the Department and two rounds of public hearings, Senator Proxmire, Chairman of the Joint Economic Committee (JEC) of Congress, invited Secretary Morton to appear before the JEC "and provide the Congress with a substantative explanation of the considerations that caused [him] to make the decision [he] made."[128] The Secretary was also asked to respond to a list of questions about his decision.

Hearings were held by the Committee in June.[129] Senator Proxmire characterized the Secretary's public statement on May 11 as "inadequate" and announced that the Committee would "inquire whether the Interior Department's evaluation process was adequate, objective and

[127] Statement of Reasons* at 44-45.

[128] Supporting documents, Vol. 6, Tab 3.

[129] *See* supporting documents, Vol. 6, Tab 5.

fair."[130] Early in the hearings a number of witnesses opposing the Secretary's decision testified. These included: Richard D. Nehring, an economist who resigned from the Department of Interior shortly after the Secretary's decision was announced; Charles Cicchetti, the author of a critique of the Final Environmental Impact Statement which was filed with the Department by the Environmental Defense Fund; David Anderson, a member of the Canadian Parliament and an Intervenor-Plaintiff in this lawsuit; and S. David Freeman, also a critic of the Final Impact Statement.

Secretary Morton testified on the last day of the hearings.[131] Following his testimony, other federal and state officials expressed support for the trans-Alaska pipeline proposal, including Under Secretary of State John N. Irwin, II, William A. Egan, Governor of Alaska, Senators Hansen of Wyoming and Stevens of Alaska, and Representative Begich of Alaska.

(Caption Omitted)

BILL OF COSTS

(February 23, 1973)

The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth ("plaintiffs"), herewith submit this itemized and verified BILL OF COSTS for the preparation and presentation of their oral argument in this Court on October 6, 1972, and the preparation and printing of the Mineral Leasing Act brief, National Environmental Policy Act brief, and Reply brief submitted by them to this Court:

1. *Clerk's fees*

Notice of Appeal	$ 5.00

[130] JEC Hearings* at 212-213.

[131] The Secretary's answers to Senator Proxmire's May 19 questions, and the portion of the JEC Hearings transcript containing the Secretary's testimony are included at supporting documents, Vol. 6, Tabs 1 and 4.

Preparation and transmission of the Record	11.50	
Filing fee	25.00	
		$ 41.50

2. *Printing of briefs and reproduction costs of exhibits and appendices*

Printing of briefs	$ 3,143.20	
Reproduction of appendices and exhibits to briefs:		
Covers	$ 120.00	
Reproduction	261.00	
Binding	180.18	
Tabs	143.00	
Cardboard blow-up of Alyeska construction technique	85.00	
	789.18	
		$ 3,932.38

3. *Expense of stenographic transcript of district court proceedings (August 14-15, 1972)* 202.50

SUBTOTAL (Items 1-3) $ 4,176.38

4. *Expenses incurred in collecting expert comment on Final Impact Statement*

Purchases of Final Impact Statement	$ 904.10	
Xeroxing at $.10 per page	1,638.80	
Postage	318.02	
Telephone	560.85	
Reproduction for public experts comments	897.25	
		$ 4,319.02

5. *Cost of depositions* $ 2,556.25

SUBTOTAL (Items 4-5) $ 6,875.27

6. *Attorneys' Time and Labor Researching and Writing Mineral Leasing Act Brief and Mineral Leasing Act Portion of Reply Brief*

Dennis M. Flannery	562 hrs. at $____ per hr.	$_____
Saunders C. Hillyer	90 hrs. at $____ per hr.	$_____
James N. Barnes	80 hrs. at $____ per hr.	$_____
John F. Dienelt	30 hrs. at $____ per hr.	$_____

SUBTOTAL 762 hours

7. *Attorneys' Time and Labor from March 20, 1972 to May 4, 1972 collecting expert comment on Impact Statement*

Dennis M. Flannery	324 hrs. at $____ per hr.	$_____
John F. Dienelt	240 hrs. at $____ per hr.	$_____
Thomas B. Stoel, Jr.	90 hrs. at $____ per hr.	$_____
Saunders C. Hillyer	324 hrs. at $____ per hr.	$_____
James N. Barnes	324 hrs. at $____ per hr.	$_____

SUBTOTAL 1,302 hours

8. *Attorneys' Time and Labor from May 12, 1972 to August 7, 1972*

Dennis M. Flannery	518 hrs. at $____ per hr.	$_____
John F. Dienelt	568 hrs. at $____ per hr.	$_____
Thomas B. Stoel, Jr.	325 hrs. at $____ per hr.	$_____
Saunders C. Hillyer	476 hrs. at $____ per hr.	$_____
James N. Barnes	380 hrs. at $____ per hr.	$_____

SUBTOTAL
2,267 hours

9. *Attorneys' Time and Labor Supervising the Printing of Briefs and the Reproduction of Exhibits and Appendices for Submission to this Court and preparing for Oral Argument in this Court*

Dennis M. Flannery	83 hrs. at $____ per hr.	$_____
John F. Dienelt	33 hrs. at $____ per hr.	$_____
Thomas B. Stoel, Jr.	8 hrs. at $____ per hr.	$_____

SUBTOTAL
124 hours

The Court's attention is also invited to the attached Affidavit of Counsel and the accompanying Memorandum in Support of Award of Expenses and Attorneys' Fees.

I, Dennis M. Flannery, do hereby verify that, to the best of my knowledge and belief, the foregoing statement of expenses and time and labor is correct; that the expenses and time and labor were necessarily incurred in the

case; and that the services for which charges have been made were actually and necessarily performed.

/s/ Dennis M. Flannery
DENNIS M. FLANNERY

(SUBSCRIPTION OMITTED)

Affidavit of Counsel

CITY OF WASHINGTON)
) ss
DISTRICT OF COLUMBIA)

Dennis M. Flannery, being duly sworn according to law, upon his oath does despose and state as follows:

1. Since August 1971 I have been responsible for the day to day administration of the Alaska Pipeline litigation for The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth. In this capacity, I have had ultimate authority to approve all disbursements and have coordinated the efforts of co-counsel, student legal interns, public experts, and non-legal staff. In submitting the attached BILL OF COSTS, I have personally reviewed the records and invoices maintained by The Center for Law and Social Policy. The expenses listed in Items 1-5 are accurate and are supported by invoices or contemporaneous records that I have examined.

2. I believe that a detailed explanation of Items 4-5 (which are not self-explanatory) and the attorneys' time computations (Items 6-9) would be of assistance to the Court. The explanation contained in the succeeding sections of this Affidavit is intended to be factual, setting forth only the basis of the various computations. The legal theories on which plaintiffs base their claim for recovery are set forth in the accompanying Memorandum in Support of Award of Expenses and Attorneys' Fees ("Memorandum").

3. *Expenses incurred in collecting expert comment on the Final Impact Statement* (Item 4):

a. On March 20, 1972, the Interior Department released the Final Impact Statement, announced it was setting aside only 45 days for public comment (such comments being due by May 4, 1972), and furnished plaintiffs, free of charge, ten copies of the statement.

b. In the preceding months, some sixty experts (located across the United States and Canada) had been contacted by plaintiffs' counsel and had indicated a willingness to provide comments on the Impact Statement. (No recovery is being requested of this Court for the substantial expenses and attorneys' time incurred in this effort prior to March 20, 1972.)

c. The ten copies of the Impact Statement provided by the Interior Department were, of course, insufficient for the number of experts who had volunteered their assistance. Plaintiffs' counsel, therefore, purchased from the Government as many additional sets as were available (they expended a total of $904.10, with each set costing in excess of $40.00); and they xeroxed large portions of the Impact Statement for the remaining experts ($1,638.80).

d. Because of the extremely short (we would characterize it as "unrealistic") time allowed by the Interior Department for public comment, plaintiffs' counsel worked extremely long hours (see paragraph 7a, *infra*) during the period March 20-March 25, distributing all or part of the Impact Statement to the various experts, and speeding the statement to them by first class air mail ($318.02).

e. In the succeeding weeks between March 27 and May 4 (when plaintiffs' counsel submitted the expert comments they had collected to the Interior Department), plaintiffs' counsel made numerous long distance telephone calls to the various experts to confirm their receipt of the statement, to assist in the preparation of their comments, and otherwise to assure that the extremely short deadline would not result in a lack of input to the Interior Department from independent experts ($560.85). The result of this

effort is contained in the four volumes of expert comment contained at Ad. Rec. 4.3.2.1. Plaintiffs had these comments professionally duplicated, since the expense incurred thereby was considerably less than would have been incurred by in-house reproduction at the Center for Law and Social Policy. The minimum number of copies for which such savings could be incurred was 25. Plaintiffs have, accordingly, requested recovery of the expense of 25 copies ($897.25).

g. For the legal basis of plaintiffs' claim for recovery of these expenses, see Memorandum, pp. 13, 24-25.

4. *Expense of depositions* (Item 5)

a. The only deposition-related expense for which plaintiffs request recovery from this Court is the expense to plaintiffs of the original and one copy of the seven depositions taken between May 18, 1972, and June 24, 1972 (Messrs. Horton, Brew, Sanger, Vogely, Carter, Nehring, and Secretary Morton), which amounts to $2,556.25.

b. For the legal basis of plaintiffs' claim for the recovery of these expenses, see Memorandum, pp. 14, 24-25.

5. *General Comments Concerning Attorneys' Time and Labor* (Items 6-9)

a. No award is being requested for the substantial and indispensable effort (amounting to several hundred man/woman-hours) expended by student legal interns of the Center for Law and Social Policy, Environmental Defense Fund, Inc., and Natural Resources Defense Council, Inc.; no award is being requested for the several hundred man/woman hours of overtime contributed by the non-legal staffs of the plaintiff organizations and the Center for Law and Social Policy; and no award is being requested for the invaluable assistance of the distinguished "of counsel" in the case.

b. A brief resume of the lawyers for whose efforts a fee award is being requested is attached to this Affidavit.

c. Plaintiffs' counsel have not kept hourly records of time spent on the Alaska Pipeline litigation. I can, however, verify, on the basis of personal knowledge and information and belief, that the hours listed in the BILL OF COSTS substantially understate the hours actually expended by the lawyers involved. I can state further that the task of reconstructing the hours expended by the lawyers on the case was not difficult since each lawyer spent all or practically all of his time on the Alaska Pipeline litigation during the periods covered. Thus:

(1) I worked exclusively on the Alaska Pipeline litigation, except for the following periods: March 8-April 10, when I also prepared the appellees' brief in the unrelated cases of *Gayer* v. *Laird*, No. 71-1934, and *Ulrich* v. *Laird*, No. 71-1935, (now under submission to this Court); June 5-12 and June 15-18, when I was on vacation.

(2) Mr. Dienelt worked exclusively on the Alaska Pipeline litigation except for the following periods: March 27-April 5, when he prepared a brief to the Environmental Protection Agency in connection with the administration proceedings regarding cancellation of DDT; May 15-16, when he presented oral argument before the EPA in the DDT case; and June 10-17, when he was on vacation.

(3) Mr. Stoel, except for routine administrative matters, worked exclusively on the Alaska Pipeline litigation. And, Messrs. Hillyer and Barnes worked exclusively on the Alaska Pipeline litigation.

6. *Attorneys' Time and Labor on Mineral Leasing Act* (Item 6)

a. During the period January 5, 1972 to March 7, 1972, I devoted most of my efforts (together with those of a student legal intern, Kenneth Kamlet) to researching and drafting what ultimately became plaintiffs' Mineral Leasing Act brief. I conservatively estimate that during the time I spent an average of 48 hours a week on this enterprise, for a total of 432 hours. During this same

period, Messrs. Barnes and Hillyer performed a conservatively estimated, 50 hours each of research at my direction on an as-needed basis. In addition, Mr. Dienelt spent a conservatively estimated 20 hours reviewing early drafts of the brief and making editorial suggestions.

b. Commencing on May 8, 1972, while awaiting the decision of Secretary Morton, work was renewed on the Mineral Leasing Act Brief. On the day Secretary Morton's decision was announced (May 11, 1972), Mr. Hillyer, Mr. Barnes, and I worked (with two typists and a Xerox operator) until 4:00 a.m. the following morning putting the brief in final form for filing on May 12, 1972. I estimate conservatively that I worked 50 hours on the Mineral Leasing Act Brief during the period May 8, 1972-May 12, 1972; and that Mr. Hillyer and Mr. Barnes each worked 30 hours.

c. During the period July 20, 1972-August 6, 1972, I conservatively estimate that I spent 80 hours researching and writing the Mineral Leasing Act portions of plaintiffs' Reply Brief. Mr. Hillyer spent 10 hours (conservatively estimated) doing research at my direction. Mr. Dienelt spent 10 hours (conservatively estimated) assisting in editing the Mineral Leasing Act portions of the Reply Brief.

7. *Attorneys' Time and Labor from March 20, 1972 to May 4, 1972* (Item 7)

a. During the week March 20, 1972 to March 25, 1972, Mr. Hillyer, Mr. Barnes and I worked an average of fourteen hours a day (conservatively estimated) securing impact statements or making copies thereof, dispatching them to experts, and maintaining telephone contact with those experts. Each of us, therefore, spent 84 hours on that effort. During March 20-March 24, Mr. Dienelt worked an average of 12 hours a day (conservatively estimated), for a total of 60 hours.

b. In the ensuing six week period (March 27-May 4) Messrs. Hillyer, Barnes and I spent an extremely con-

servative estimate of 40 hours a week carrying out the functions described at para. 3e, *supra*. During this period, each therefore expended 240 hours on brief-related work. During the same period, Mr. Dienelt spent a conservatively estimated 40 hours a week on brief-related work for four-and-one-half weeks, for a total of 180 hours and Mr. Stoel spent a conservatively estimated 90 hours on brief-related work.

8. *Attorney's Time and Labor from May 12, 1972 to August 7, 1972* (Item 8)

a. From May 12, 1972 to June 24, 1972, I worked (except for the period June 5-11 and June 15-18 when I joined my wife and children on vacation) preparing for and taking four of the seven depositions listed in the BILL OF COSTS; preparing factual chronologies and organizing documents for use in brief writing; and preparing structural outlines of the NEPA brief. An extremely conservative estimate of the hours expended by me in these endeavors is 232 hours (computed on the basis of 8 hours a day, 6 days a week). During the same period (with the exception of May 15-16 and June 10-17 for Mr. Dienelt), Messrs. Dienelt, Stoel, Barnes and Hillyer performed the same range of functions as I did. A conservative estimate for Mr. Dienelt is 232 hours; for Mr. Stoel, 215 hours; for Mr. Barnes, 200 hours; and for Mr. Hillyer, 104 hours.*

---

* On May 26, 1972, the defendant oil companies served on plaintiffs an exhaustive set of interrogatories designed to explore the adequacy of their standing under *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). In plaintiffs' view, the information requested in the interrogatories went far beyond the *de minimis* membership disclosure requirements contemplated by the *Sierra Club* decision. But to assure that the pipeline case would be heard on the merits, I placed Mr. Hillyer in charge of preparing a comprehensive response to these interrogatories. This required extensive communication with plaintiffs' officers and members across the country. Plaintiffs' response to these interrogatories was filed on June 26, 1972. I estimate conservatively that Mr. Hillyer expended some 100 hours on this endeavor and Mr. Dienelt more than 20 hours. Because the standing question was never again raised by defendants (and is not, therefore, addressed in the briefs), no claim is being made for any award for these efforts. Nor is an award being requested for the efforts expended by plaintiffs' counsel during this period in drafting and filing their updated Supplemental Complaint, which was filed on May 16, 1972.

b. From June 25, 1972 to July 13, 1972, Messrs. Dienelt, Hillyer, Barnes, and I each spent a conservatively estimated 228 hours (an average of 12 hours a day, including Saturdays and Sundays) preparing the NEPA brief, for a total of 912 hours. During this same period, Mr. Stoel spent a conservatively estimated 110 hours on the same endeavors.

c. During the weekend July 14, 15, 16, Messrs. Dienelt, Hillyer, Barnes and I spent a total of 48 hours each (together with numerous typists, clerks and legal interns) preparing the NEPA brief for submission to the District Court on July 17, 1972, for a total of 192 hours.

d. During the week of August 1-August 7, Mr. Dienelt spent 60 hours writing the NEPA portion of the Reply Brief and I spent 10 hours editing that portion.

9. *Attorney's Time and Labor Preparing Materials and Oral Argument for this Court* (Item 9)

In the period between September 1, 1972, when this Court granted plaintiff's Motion for an expedited hearing and October 6, 1972, when oral argument was heard, I spent 40 hours preparing materials for submission to the Court, 40 hours preparing for oral argument, and 3 hours at oral argument (for a total of 83 hours). Messrs. Dienelt and Stoel spent 33 and 8 hours respectively, assisting in the preparation for and attending the oral argument.

10. For the legal basis on which plaintiffs rest their request for attorneys' fees, see Memorandum, pp. 15-27.

/s/ Dennis M. Flannery
DENNIS M. FLANNERY

(Subscription Omitted)

Lawyers' Resumes

DENNIS M. FLANNERY—B.A. Fordham University—1961 (Summa cum laude, Phi Beta Kappa); LL.B. University of Pennsylvania—1964 (First in class standing, Summa cum laude, Editor-in-Chief, Law Review, Order of the Coif); Law Clerk, Chief Justice Earl Warren—1964-1965; Captain Third Infantry Division, United States Army—1965-1967 (Army Commendation Medal); Consultant, Bureau of the Budget—October 1967-January 1968 (White House Task Force on Crime); Attorney, Wilmer, Cutler & Pickering, Washington, D.C.—January 1968-August 1971; Attorney, Center for Law and Social Policy—August 1971-present. Member District of Columbia and New York Bars.

JOHN F. DIENELT—B.A. University of Virginia—1965 (First in class standing, Phi Beta Kappa, Danforth Fellowship); M.A. Fletcher School of Law & Diplomacy—1966; LL.B Yale Law School—1969 (Managing Editor Law Journal and Order of the Coif); Law Clerk, District Judge Gerhard A. Gesell—1969-1970; Assistant to the Solicitor General, United States Department of Justice—1970-1971; Washington Counsel, Environmental Defense Fund—August 1971-present. Member District of Columbia Bar.

THOMAS B. STOEL, JR.—B.A. Princeton University—1962 (Cum laude, Sigma Xi); LL.B Harvard University—1965 (Fourth in class standing, Magna cum laude, Note and Supreme Court Note Editor, Law Review); Rhodes Scholar, Oxford University—1965-1967; Law Clerk, Justice Harlan—1967-1969; Staff Attorney, Cabinet Task Force on Oil Import Control—July 1969-February 1970; Assistant Director-Deputy Director, Cabinet Committee on Education—April 1970-December 1970; Acting Executive Assistant-Special Assistant, Director Office of

Management and Budget—December 1970-August 1971; Co-Founder and Staff Attorney, Natural Resources Defense Council—September 1971-present. Member District of Columbia Bar.

SAUNDERS C. HILLYER—B.A. University of Virginia—1965 (Honors Graduate, Phi Beta Kappa); LL.B Yale Law School—1968; Peace Corps Volunteer—July 1968-May 1970; United States Forest Service—June 1970-September 1970; Attorney, Alaska Pipeline case—February 1971-October 1972. Member District of Columbia Bar.

JAMES N. BARNES—B.A. Northwestern University—1966; LL.B University of Michigan—1970 (Editor, Law Review and Order of the Coif); Law Clerk, District Judge John H. Pratt—1970-1971; Attorney, Alaska Pipeline case—October 1971-September 1972. Member District of Columbia Bar.

Supreme Court, U. S.
FILED
SEP 3 1974
MICHAEL RODAK, JR., CLERK

No. 73-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

ALYESKA PIPELINE SERVICE COMPANY,
Petitioner,
v.
THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTION PRESENTED

Whether it was an abuse of discretion for the court of appeals to authorize a partial award of attorneys' fees to respondents whose efforts compelled petitioner to obtain constitutionally-required congressional approval for the Trans-Alaska pipeline and to institute massive improvements in its technical design and environmental safeguards.

INTRODUCTION

The decision below represents a concluding chapter in the adjudication of the Trans-Alaska pipeline controversy by the Court of Appeals for the District of Columbia Circuit. The decision on the merits is contained in the court of appeals' landmark opinion, *Wilderness Society* v. *Morton*, 479 F.2d 842 (D.C. Cir. 1973). This Court denied certiorari on the merits without dissent. 411 U.S. 917 (1973).

The present petition for certiorari should similarly be denied for traditional reasons set forth in Rule 19 of the Rules of this Court. There is no conflict among circuits. The court of appeals did not interpret any federal or state statute. And the amount of fees actually to be awarded awaits further action by the district court on remand.

Most importantly, the decision below [1] rests on the unusual factual circumstances of a particular case. An understanding of those facts—which the court of appeals correctly characterized as "extraordinary"—requires a fuller statement than that set forth in the Petition. That statement demonstrates that the partial award of fees in this case was correct and fully consistent with principles previously established by this Court.

STATEMENT

The Trans-Alaska oil pipeline has come to be recognized as the "most complex" and "most ecologically

[1] The decision, which is set forth in an Appendix to the Petition, is now also reported at 495 F.2d 1026. Citations to it will be made both to the official report and to the Appendix (hereafter referred to as "Pet. App.").

sensitive" engineering project ever attempted.[2] Its construction across the public lands of the United States will now be subjected to stringent conditions imposed by the Congress, including technological and environmental safeguards intended to reflect the enormity of the undertaking. As recently summarized:

> "[C]ompanies that originally proposed to sink a hot pipeline in tricky permafrost as if it were just another pipeline [have] changed course . . . .
>
> * * * *
>
> "The pipe has [now] been tested . . . and . . . exposed . . . to check its effects on permafrost and . . . the effect of the permanently frozen ground on the pipe. The research has included studies on permafrost thaw bulbs, flood plains, rivers, oil spills, seismic and thermal stresses. . . .
>
> "Fifty per cent of the pipeline will now be elevated instead of 10 per cent, as originally envisaged. Disturbed land will be revegetated. . . . In places where the pipe would have been elevated for engineering purposes, it will now

[2] Statement of Undersecretary of the Interior, William T. Pecora, contained in record below at P. Docs. III, Tab B, at 4.

The pipeline will traverse the entire State of Alaska. For most of its 800-mile journey (641 miles of which cross federal public lands), the pipeline will travel through areas of intense seismic activity; it will intersect previously untouched wilderness areas, climb mountains, ford and span hundreds of rivers and streams; and it will affect, in varying degrees, millions of birds, fish, mammals, and other forms of wildlife.

be buried and refrigerated so that caribou can cross." [3]

The circumstances under which the Trans-Alaska pipeline will be constructed are, in short, a far cry from what would have obtained if respondents had not vigorously pursued the successful litigation, culminating in the court of appeals' decision in *Wilderness Society* v. *Morton*, *supra*, 479 F.2d 842, that preceded the decision here in issue.

Petitioner, Alyeska Pipeline Service Company, is a consortium owned by ARCO Pipeline Company, Humble Pipeline Company, Sohio Pipeline Company, Mobil Pipeline Company, Phillips Petroleum Company, Amerada Hess Corporation, and Union Oil of California. On June 6, 1969, Alyeska's principals presented the Interior Department with a map, some miscellaneous papers, a check for $10, and an application to begin construction. Although they recognized from the outset that the project they were proposing could not meet the conditions that Congress had imposed on private pipelines across the public lands and they possessed only the most general concepts of Arctic pipeline technology, they nonetheless proposed that construction begin immediately.

When it was announced in March, 1970, that the first phase of pipeline construction was imminent, respondents — three non-profit organizations — filed suit and obtained a preliminary injunction. *Wilderness Society* v. *Hickel*, 325 F. Supp. 422 (D.D.C. 1970). The injunction was premised on two grounds: (1) that Congress as the exclusive constitutionally

[3] N.Y. Times, May 26, 1974, § 1 at 34, cols. 3, 4.

designated guardian of the public lands (Art. 4, § 3, cl. 2) had established limitations in the Mineral Leasing Act on the diversion of those lands to private pipeline use and that the massive deviation from those limitations proposed by Alyeska's principals could not be effected without congressional approval; and (2) that none of the environmental and other safeguards set forth in the National Environmental Policy Act had as yet been applied to the project. 325 F. Supp. at 424.

Standing alone, this action by respondents conferred monumental benefits on the public generally and on Alyeska specifically. For, as Russell E. Train (then Chairman of the President's Council on Environmental Quality, now Administrator of the Environmental Protection Agency) has asserted:

> "The problems of constructing a pipeline across one of the most seismically active and remote areas of the world are . . . very real. These and other significant problems were simply not adequately faced in the initial proposal presented to the Department of the Interior in 1969.
>
> "If the pipeline had been constructed using the original design specifications, it would very likely have resulted in not only very serious environmental damage but also serious operational problems. *Indeed, the physical integrity of the pipeline itself was very much at stake.*" (Emphasis added.) [4]

[4] Statement before the Joint Judicial Conference of the Eighth and Tenth Circuits, June 29, 1973, quoted at 495 F.2d 1033 n.3; Pet. App. 12a n.3. More bluntly, but to the same

Respondents' early initiative proved, however, to be only the beginning of the responsibilities they were compelled to shoulder. Despite the warning of the preliminary injunction, no effort was made to seek congressional approval for the Alaska pipeline. Moreover, despite the attention that respondents had drawn to the enormous technological and environmental complexities of the proposed undertaking, Alyeska was not yet prepared to grapple realistically with those complexities.

Respondents, therefore, again undertook important public responsibilities when, on January 15, 1971, the Interior Department published a "draft impact statement" on the pipeline. That statement, discovery disclosed, had been radically revised at Alyeska's behest before publication to delete or soften numerous negative observations about Alyeska's proposal.[5] At substantial cost and effort, respondents arranged for expert witnesses in a broad range of technological, environmental, and other disciplines to appear at public hearings and explain the numerous shortcomings and omissions that remained in Alyeska's proposal.[6]

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effect, former Secretary of the Interior Hickel has been quoted recently as asserting that: "That first pipeline wouldn't have just been an environmental disaster. . . . It would have been a total engineering disaster." N.Y. Times, May 26, 1974, § 1, at 34, col. 4.

[5] See Deposition of Deputy Undersecretary of the Interior Jack O. Horton at 101-02, 111-12 and Exhibits A-E thereto.

[6] The public hearings were held by the Department of the Interior in Washington, D.C., and Anchorage, Alaska, in February 1971.

Only after these public hearings were serious efforts undertaken to explore the technological[7] and environmental[8] ramifications of Alyeska's proposal. The results of these undertakings were released to the public on March 20, 1972, in the form of a 6-volume Environmental Impact Statement and 3-volume Economic and Security Analysis.

On May 11, 1972, the Secretary of the Interior announced that Alyeska would be authorized to commence pipeline construction. On the following day, May 12, 1972, respondents sought summary judgment on the threshold Mineral Leasing Act issue.[9] Alyeska, however, which had entered the litigation on September 21, 1971, and thereafter assumed a leading role in the litigation, vigorously opposed the Motion. Alyeska argued that the Mineral Leasing Act "issues and those relating to the National Envi-

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[7] Deposition of Dr. Frederick Sanger, Chairman of the Interior Department's Technical Advisory Board at 8.

[8] Deposition of Dr. David A. Brew, Chairman of the Interior Department's Environmental Impact Statement team, at 7, 88-89.

[9] Respondents' Motion stated in pertinent part:

> "The grounds for [respondents'] motion are that the Mineral Leasing Act issues present threshold questions . . .; the NEPA issues need be adjudicated only if the permits contemplated by the Secretary are not prohibited by the Mineral Leasing Act; and if said permits are prohibited by the Mineral Leasing Act, it would be a waste of judicial time and effort for [the] court to adjudicate the far more complicated NEPA issues which would, in that event, be reduced to hypothetical questions." Motion of Respondents for Partial Summary Judgment, May 12, 1972, at 1.

ronmental Policy Act . . . are inseparably associated with the technical details of how the trans-Alaska pipeline system will be built" and that the presentation to the court of both sets of issues was essential to a "full factual understanding of the project." [10]

The result was the preparation and presentation to the court of "a record and a set of briefs" on both the Mineral Leasing Act and National Environmental Policy Act issues "commensurate with the multi-billion-dollar project at stake." *Wilderness Society* v. *Morton*, *supra*, 479 F.2d at 846. And, following a five-month review of the "entire fact picture" that Alyeska had contended was necessary for a "fully informed" judgment,[11] the court of appeals concluded, in its exhaustive 50-page opinion issued on February 9, 1973:

> "Article 4, § 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory [or] other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations." 479 F.2d at 891.
>
> * * * *
>
> "These companies have now come into court, accompanied by the executive agency authorized to administer the statute, and have said, 'This is not enough land; give us more.' We have no

[10] Motion of Alyeska Pipeline Service Company to Place Respondents' Motion for Partial Summary Judgment in Abeyance, May 17, 1972, at 7-8.

[11] *Id.* at 8.

> more power to grant their request, of course, than we have the power to increase congressional appropriations to needy recipients." *Ibid.*
>
> * * * *
>
> "Congress intended to maintain control over pipeline rights-of-way and to force the industry to come back to Congress if the amount of land granted was insufficient for its purposes. *Id.* at 892.

The court further determined that the National Environmental Policy Act issues, while "complex and important" in their own right and having served as a predicate for a "precise analysis" of the controlling Mineral Leasing Act questions, were not themselves "ripe for" adjudication." 479 F.2d at 889; 495 F.2d at 1035, Pet. App. at 17a.

Petitions for Certiorari were filed on March 9, 1973. Respondents' opposition, filed on March 28, 1973, asserted in pertinent part:

> "[T]he petitioners could not convince even one of the judges [below] that the relief they seek should be obtained from the courts, rather than from the Congress.
>
> * * * *
>
> "Petitioners should take their case for obtaining use of the public lands to Congress, where the policy issues they raise in their briefs may be debated and resolved on the merits.
>
> * * * *
>
> "The critical point is that Congress will, by adopting or refusing to adopt any of several pending legislative solutions, dispose of each of the policy issues—including the basic issue of whether the energy needs of the country . . .

> require immediate construction of the Alaska Pipeline—that petitioners have urged upon this Court as reasons for granting review." (Footnote omitted.)[12]

Five days later, on April 2, 1973, this Court denied certiorari, without dissent. 411 U.S. 917.

With its jurisdiction over the public lands preserved, Congress embarked upon intensive deliberations concerning the construction of the proposed Trans-Alaska pipeline. In language that mirrored that of the court of appeals, Congress concluded that:

> "It is fitting and proper for Congress to make this decision. The issue is of national importance. The issue involves the use of the public lands, the control of which the Constitution expressly reserves to Congress. It is the responsibility of Congress to decide whether the pipeline should be authorized."[13]

More than ten months of hearings and debate convinced Congress that, while additional delay in the construction of the Trans-Alaska pipeline was not justified as a matter of policy, the four-year delay that had occurred had produced important benefits:

> "[T]he risk of environmental damage . . . has been substantially lessened as a result of the stricter environmental stipulations, redundant safety systems, contingency planning and better

[12] Brief in Opposition to the Petitions for Certiorari in Nos. 72-1227, 1228, 1229, at 2, 9, 18-19 (October Term, 1972).

[13] H. R. Rep. No. 93-414, 93d Cong., 1st Sess. 14 (July 28, 1973).

> engineering imposed upon the proposed Trans-Alaska pipeline."[14]

Accordingly, Congress determined "under [its] constitutional authority . . . to control the use of public lands, that . . . the Trans-Alaskan pipeline is in the national interest"; that the pipeline could now be subjected to "more safeguards than ever have been required for pipelines"; and that "further litigation over the environmental issue . . . is not justified."[15]

Public Law No. 93-153, 87 Stat. 577 was, therefore, enacted into law on November 16, 1973. It set forth a completely new charter for pipelines crossing public lands and specifically authorized, subject to the terms and conditions set forth in the Act, the construction of the Trans-Alaska pipeline without

[14] S. Rep. No. 93-207, 93d Cong., 1st Sess. 18 (June 12, 1973).

These benefits were acknowledged by some of the pipeline's most ardent supporters. See, *e.g.*, Statement of Senator Gravel, *Hearings on S.970, S.993 and S.1565 Before the Senate Committee on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 4, at 56 (May 3, 1973) ("While the four-year delay in construction of the Alaska Pipeline has been costly to the United States in balance of payments and a worsening energy shortage, it has—and I think most of us agree, including the oil industry—served a very useful purpose. A safer line will be constructed today than could have been constructed four years ago."); Statement of (then) Under Secretary of the Treasury William E. Simon, *Hearings on S.970, S.993 and S.1565 Before the Senate Committee on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 4, at 127 (May 3, 1973) ("past delays and resultant research have greatly reduced the magnitude of [the] risks").

[15] H. R. Rep. No. 93-414, 93d Cong., 1st Sess. 11, 15, 14 (July 28, 1973).

further action under the National Environmental Policy Act.

On April 4, 1974, the court of appeals determined that the factual circumstances of the litigation that culminated in its decision in *Wilderness Society* v. *Morton*, *supra*, 479 F.2d 842, were "extraordinary" and supported a partial award of attorneys' fees. 495 F.2d at 1026, 1031; Pet. App. at 1a, 7a. The court explained that respondents, with no hope of obtaining monetary damages, had been compelled to undertake a legal effort of "monumental proportions" to "forc[e] Alyeska to go to Congress." 495 F.2d at 1032, 1033; Pet. App. at 10a, 12a. Respondents' suit had consistently served as a "catalyst to effect change" in the environmental and technological aspects of the pipeline. 495 F.2d at 1034-35; Pet. App. at 14a-16a. And, more directly, having preserved for Congress its "primary responsibility . . . under the Constitution to regulate the use of public lands," respondents' legal efforts had given Congress the opportunity to enact "important new requirements designed to protect the public interest" —such as "elaborate specific procedures . . . to ensure protection of environmental interests" (Pub. L. 93-153, § 101); the imposition of strict liability "for damages resulting from use of the right-of-way" (Pub. L. 93-153, § 204); and the requirement that Alyeska "maintain a $100,000,000 liability fund to satisfy . . . claims" (Pub. L. 93-153, § 204(c)(5)). 495 F.2d at 1033-34; Pet. App. 11a-13a.

The court concluded that whether it looked to "the Mineral Leasing Act . . . issues upon which the court rested its opinion declaring the pipeline unlawful,

or the National Environmental Policy Act (NEPA) issues which the court left undecided," respondents had "advanced and protected in a very concrete manner substantial public interests." 495 F.2d at 1032, 1036; Pet. App. at 11a, 17a-18a.

The "equities of this particular case" justified, in the court's view, a partial "fee shifting" from respondents to Alyeska. As the court explained, Alyeska's principals first "persuad[ed] the Interior Department to grant the rights-of-way" and then Alyeska "intervened in th[e] litigation to protect its massive interests." Once in the litigation, Alyeska not only participated "actively" as a "major and real party" (Alyeska filed some 334 printed pages of briefs with the court of appeals and was allocated the major portion of the oral argument that preceded the court of appeals' decision on the merits), but was a moving force in requiring respondents "to brief and argue an issue which, because of their very success on the Mineral Leasing Act issue, never became ripe for adjudication." 495 F.2d at 1036, 1035; Pet. App. at 18a, 17a.

In its limited ruling, the court of appeals allowed no award of attorneys' fees to respondents for the thousands of man hours expended by their counsel prior to Alyeska's intervention; nor for any legal effort not related directly to the preparation and presentation of the briefs and oral argument that served as the basis for the court of appeals' decision on the merits. Even with regard to the latter, the court limited the award against Alyeska to "half of

the total fees," [16] the "amount to . . . be fixed in the first instance by the District Court, after hearing evidence if necessary as to the extent and the nature of the services rendered." 495 F.2d at 1036; Pet. App. at 19a.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. An Award of Fees in the Circumstances of This Case Is Consistent With Principles Previously Established by This Court.

The court of appeals' partial award of fees is fully consistent with principles previously established by

[16] As the court explained:

> "Under 28 U.S.C. § 2412 . . . no attorneys' fees can be imposed against the United States . . . .
>
> "Fee shifting under the private attorney general theory, however, is not intended to punish law violators, but rather to ensure that those who have acted to protect the public interest will not be forced to shoulder the entire cost of litigation. *Cf. Hall* v. *Cole, supra*, 412 U.S. at 14. . . . Since Alyeska unquestionably was a major and real party at interest in this case, actively participating in the litigation along with the Government, we think it fair that it should bear part of the attorneys' fees. . . . *In recognition of the Government's role in the case, on the other hand, Alyeska should have to bear only half of the total fees. The other half is properly allocated to the Government and, because of the statutory bar, must be assumed by appellants* [*i.e.* respondents]. In this manner the equitable principle that appellees [*i.e., Alyeska*] bear their fair share of this litigation's full costs and the congressional policy that the United States not be taxable for fees can be accommodated." (Emphasis added.) (Footnote omitted.) 495 F.2d at 1036; Pet. App. at 18a-19a.

this Court concerning the authority of federal courts to determine whether "special circumstances exist that would justify an award of attorneys' fees." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970). This Court has repeatedly held that "federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require." *E.g., Hall* v. *Cole*, 412 U.S. 1, 4-5 (1973). The Court has also recognized that one equitable factor that has been applied in support of an award of fees is the extent to which "the expense of litigation may often be a formidable if not an insurmountable obstacle to the private litigation necessary to enforce important public policies." *F. D. Rich Co.* v. *United States*, 94 S.Ct. 2157, 2165 (1974) (footnote omitted).

In *Hall* v. *Cole, supra*, which involved provisions authorizing private suits under federal labor law, the Court noted that the unavailability of fees might be construed as "tantamount to repealing the Act itself by frustrating its basic purpose." 412 U.S. at 13. *Compare Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) ("If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.")

To be sure, an award of attorneys' fees remain the exception rather than the rule. See *F. D. Rich Co.* v. *United States, supra.* Yet, the authority of federal courts to award fees may be exercised when "overriding considerations indicate the need for such a recovery." *Mills* v. *Electric Auto-Lite Co.*, 396

U.S. at 391-392.[17] Such "overriding considerations" are plainly present here.

The court of appeals' decision sets forth in great detail the overriding considerations that led the court —on the basis of its extensive familiarity with the massive and complex record compiled below—to make a partial award of fees. The most salient of those considerations is the simple fact that were it not for respondents' efforts in this litigation the Alaska pipeline would not have been subjected to the conditions that Alyeska now cites as justifying its construction.

At a time when "commitment to improving and protecting our national environment is one of the most vital of current national policies," 495 F.2d at 1034; Pet. App. at 13a, a potential disaster was averted only because respondents, with no hope of recovering monetary damages, undertook "meritorious litigation . . . of monumental proportions." 495

[17] As the Court recently stated in *Hall* v. *Cole*, *supra*, 412 U.S. at 4-5:

> "Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation.' *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 166 (1939), and federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery.' *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391-392 (1970); see *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967)." (Footnote omitted.)

F.2d at 1032; Pet. App. at 10a.[18] In such a case, where an award of fees "would not have unjustly discouraged [a defendant such as] Alyeska from defending its case in court" and "denying fees might well have deterred [plaintiffs such as respondents] from undertaking the heavy burden of . . . litigation," it does not constitute an abuse of discretion for a court to determine that the equities of the case favor "an award of attorneys' fees to the successful plaintiffs." 495 F.2d at 1036; Pet. App. at 17a-18a.

2. There Is No Conflict Among Circuits.

There is no conflict among circuits for the Court to resolve in this case. Every circuit that has addressed the question and whose decision remains undisturbed has followed the approach taken by the District of Columbia Circuit in the instant case and concluded that in appropriate circumstances a proper rationale for fee shifting may, as this Court recently summarized, be "based on the premise that the ex-

[18] As the Honorable Russell E. Train summarized in his remarks before the Joint Judicial Conference of the Eighth and Tenth Circuits at 5 n.4, *supra*:

> "In all honesty, the process has been one of learning for both industry and government. I believe that industry seriously underestimated the real technical difficulties of the task and failed to appreciate fully—particularly at the outset—the new conditions for decision-making in matters that substantially affect the environment. On its part, government was ill-equipped both institutionally and informationally for dealing with the complex problems of the pipeline. Few would now contend that the Interior Department's first response to NEPA on the pipeline right-of-way application was really adequate.

pense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important public policies." *F. D. Rich Co.* v. *United States*, *supra*, 94 S.Ct. at 2165.

The two most recent circuits to have done so are the Eighth and the Ninth Circuits. *Fowler* v. *Schwarzwalder*, 498 F.2d 143 (8th Cir. 1974); *Brandenburger* v. *Thompson*, 494 F.2d 885 (9th Cir. 1974). *Accord Donahue* v. *Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Cooper* v. *Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight* v. *Auciello*, 453 F.2d 852 (1st Cir. 1972); and cases cited in *F. D. Rich*, *supra*, 94 S.Ct. at 2165 n.18.[19]

Indeed, even the dissenting judges in the instant case implicitly endorsed the validity of the majority's articulated rationale for fee shifting. In breaking with the majority, they focused instead on whether respondents in fact had conferred a public benefit by delaying construction of the pipeline. 495 F.2d at 1041, Pet. App. at 30a (MacKinnon, J.); 495 F.2d at 1042, Pet. App. at 32a-33a (Wilkey, J.). Surely, this factual question does not require review by the

[19] An arguably contrary Fourth Circuit decision in *Bradley* v. *School Board*, 472 F.2d 318 (4th Cir. 1972), on which petitioner relies, was vacated by this Court in an opinion reported at 94 S.Ct. 2006 (1974). While primarily concerned with whether Section 718 of Title VII of The Emergency School Aid Act, 20 U.S.C. § 1617, should be applied retroactively to petitioners, the Court noted that "[i]n this litigation the plaintiffs may be recognized as having rendered substantial service both to the Board itself, by bringing it into compliance with its constitutional mandate, and to the community at large . . . ." 94 S.Ct. at 2019.

Supreme Court, and Alyeska does not suggest otherwise.

3. There Is No Present Need for This Court To Articulate More Specific Guidelines.

The lower federal courts are now in the early stage of evolving an equitable standard that appears fully consistent with the established principles of this Court. No trend toward the automatic or unthinking award of fees emerges from these decisions.[20] Rather, the various federal courts that have addressed the issue, including the court of appeals here, have examined the particular facts involved in each case to determine whether an exceptional decision, awarding fees, was warranted.

Alyeska itself appears to recognize both the early stage of development of the equitable standard at issue here and its consistency with traditional equitable principles. Alyeska would, however, limit the rationale to areas not of direct concern to it—*i.e.*, to "civil rights and reapportionment cases." Petition for Certiorari, at 9. But the equitable factors that have supported awards of fees in civil rights and reapportionment cases are not unique to those cases. And Alyeska provides no principled basis for distinguishing such cases from others posing similar overriding considerations of equity. Alyeska's position, in fact, is simply that unless a statute specifically

[20] Alyeska's assertion that the court of appeals' decision would extend "[the private attorney general doctrine] to virtually all cases in which compliance with federal laws is successfully challenged" is totally inconsistent with the reasoning and holding of the court of appeals. *Compare* Petition for Certiorari at 10-11 *with* 495 F.2d at 1031-32; Pet. App. at 7a-11a.

provides for fees courts should not award them when private litigation has been necessary to enforce important public policies. This position applies to civil rights and reapportionment cases, as well as to the decision Alyeska seeks to reverse. It appears on its face to be in conflict with numerous decisions by this Court. See, *e.g.*, *F. D. Rich Co.* v. *United States*, *supra*, 94 S.Ct. at 2165; *Hall* v. *Cole*, *supra*, 412 U.S. at 4-5; *Mills* v. *Electric Auto-Lite Co.*, *supra*, 396 U.S. at 391-392.

In sum, the action of the court of appeals in this case is completely consistent with principles previously articulated by this Court and with the recent decisions of other federal courts. The cases are uniform in their approach and comparatively few in number and any argument that they will stimulate litigation unduly or impair government decision-making is purely speculative. Under these circumstances, there is no present need for this court to grant certiorari in order to lay down more specific guidelines.

4. The Subsidiary Issues Raised by Alyeska Do Not Warrant Review by This Court.

a. Alyeska's contention that respondents should not be given an award for issues on which they did not prevail ignores entirely the bases of the decision of the court of appeals—that respondents' environmental efforts served as a catalyst for change and are reflected in the conditions that will now govern the pipeline's construction;[21] that the Mineral Leasing Act issues on which respondents clearly prevailed were interrelated with the National Environmental Policy Act issues;[22] and that, to the extent respondents litigated issues that never became ripe for adjudication, they did so at Alyeska's insistence.[23] 495 F.2d at 1035; Pet. App. at 17a.

b. Alyeska's objection to the amount that may be awarded is clearly speculative at this time since that matter has been referred to the district court for further exploration. The general guidelines set down by the court of appeals are, however, identical to those articulated by the Fifth Circuit in numerous analogous situations.[24]

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[21] *Accord Sierra Club* v. *Lynn*, 364 F. Supp. 834 (W.D. Tex. 1973) (fee award to unsuccessful plaintiffs in environmental action because legal action spurred improvements in environmental related aspects of design for real estate development). *Compare McEnteggart* v. *Cataldo*, 451 F.2d 1109 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972) (fees assessed against defendants who prevailed on appeal, where plaintiff was forced to go to court to claim statement of reasons to which he was constitutionally entitled); *Parham* v. *S.W. Bell Co.*, 433 F.2d 421 (8th Cir. 1970) (attorneys' fees awarded where lawsuit served as catalyst even though no injunction was issued); *Globus* v. *Jaroff*, 279 F. Supp. 807 (S.D.N.Y. 1968) (attorneys' fees awarded although case found to be moot). *Cf. Gilson* v. *Chock Full O'Nuts Corp.*, 331 F.2d 107 (2d Cir. 1964).

[22] A position that petitioner itself espoused at an earlier stage of the litigation. See pp. 7-8, *supra*.

[23] See p. 7, *supra*. *Compare Switzer Bros., Inc.* v. *Chicago Cardboard Co.*, 252 F.2d 407 (7th Cir. 1958).

[24] See, *e.g.*, *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534, 538 (5th Cir. 1970) (award of attorneys' fees rests on existence of attorney-client relationship, not on obligation of plaintiffs to pay fees). See *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Clark* v. *American Ma-*

c. Finally, Alyeska's contention that the Fifth Amendment bars the collection of attorneys' fees against it is frivolous. This Court has often upheld the award of attorneys' fees against private parties on the ground that the plaintiffs' lawsuit has served a public purpose. See, *e.g.*, *Hall* v. *Cole* and *Mills* v. *Electric Auto-Lite Co.*, *supra*.

In the instant case, Alyeska entered the litigation because, in its own words:

> "[I]ts interests cannot be represented adequately by existing parties; the responsibilities and duties of the Secretary of the Interior do not include or concern the proprietary and financial interests of Alyeska or the companies with whom Alyeska has contracted and for whom it is authorized to act as attorney-in-fact in connection with the applications which are the subject of this action." [25]

Surely, there is no unfairness in awarding fees against a party whose actions gave rise to the legal proceedings, who entered those proceedings to protect its own interests, and whose litigation efforts contributed substantially to the cost and complexity of the proceedings.

---

rine Corp., 320 F. Supp. 709, 711 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971). *Accord Lea* v. *Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971).

[25] Motion of Alyeska Pipeline Service Company to Intervene as a Defendant, August 20, 1971, at 4.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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One First Street, N.E.
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Re: Alyeska Pipeline Service Company, Petitioner
v.
Wilderness Society, et al, Respondents

No. 73-1977

Dear Mr. Rodak:

The purpose of this letter is to bring to the attention of the Court a decision of the United States Court of Appeals for the Fifth Circuit, rendered Friday, October 4, 1974, the slip opinion in which was not available to the undersigned counsel for petitioner until early today. A xerographic copy of the slip opinion is attached.

I apologize for not being able to furnish the Court with a printed version of the case, but in view of advice received from your office yesterday afternoon that the pending petition for writ of certiorari has already been referred to the Court, this manner of bringing the recent decision of the Fifth Circuit to the Court's attention is necessary.

The decision of the Fifth Circuit in Sierra Club v. Lynn involves issues virtually identical to those involved in the pending petition. Indeed, the court of appeals opinion describes the case as "almost identical to The Wilderness Society v. Morton. . . ." Sl. op. at 205. Like the case which is the subject of the pending petition, Sierra Club v. Lynn involved the levying of attorneys' fees against a non-government party where the underlying duty which the action sought to enforce was solely that of federal officials.

The Fifth Circuit panel (Circuit Judges Wisdom and Clark and District Judge Grooms) explicitly considered the ruling of the District of Columbia Circuit in the case which is the subject of the pending petition, and unanimously rejected the reasoning of the latter, saying:

> We decline to follow The Wilderness Society. This circuit has never assessed attorneys' fees against a party innocent of any wrongdoing. In the absence of proof that the private party controlled the government agency's actions or caused its default, it cannot be cast in judgment as a result of the agency's shortcomings. The fact that the breach of duty involved was committed by one who is immune from liability for financial redress affords no basis for a shifting of fees.
>
> * * *
>
> The result of governmental immunity in this case is to require plaintiffs to absorb their own legal expenses. Another solution for future cases must come from Congress rather than in whole or half from the pocket of an innocent party. (Sl. op. at 206-07; footnote omitted.)

The direct conflict between the decision of the Fifth Circuit and that of the District of Columbia Circuit is a compelling reason for granting the pending petition for writ of certiorari.

In view of the importance of this ruling, the impending action by the Court on the pending petition, and the fact that this letter was furnished as soon as the Fifth Circuit slip opinion became available by special messenger service from New Orleans, I request that every possible action be taken which would bring this letter and its attachment to the attention of members of the Court prior to action on the pending petition.

Very truly yours,

Robert E. Jordan, III
Attorney for Petitioner
Alyeska Pipeline Service Company

Enc.
Copies to counsel for Respondents

SIERRA CLUB et al., Plaintiffs-Appellants-Cross Appellees,

Edwards Underground Water District et al., Intervenors-Appellants-Cross Appellees,

v.

James T. LYNN, Secretary of the U. S. Department of Housing and Urban Development, et al., Defendants-Appellees-Cross Appellants,

San Antonio Ranch, Ltd., Defendant-Appellee-Cross Appellant,

Texas Water Quality Control, Intervenor.

No. 73-3378.

United States Court of Appeals, Fifth Circuit.

Oct. 4, 1974.

Citizens groups brought action for declaratory and injunctive relief with respect to development of new community under housing and urban development program. State Water Quality Board intervened on behalf of defendants, and underground water district intervened with county on behalf of plaintiffs. The United States District Court for the Western District of Texas at San Antonio, Adrian A. Spears, Chief Judge, 364 F.Supp. 834, entered orders and appeals were taken. The Court of Appeals, Clark, Circuit Judge, held that Secretary of HUD acted neither arbitrarily nor capriciously, nor failed to act in accordance with law when he determined to grant developers of the new community federal assistance under the Urban Growth and New Community Development Act; that environmental impact statement filed by HUD was

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sufficient; that plaintiffs failed to state claim under the Water Pollution Prevention and Control Act; that in absence of proof that developer controlled the government agency's actions or caused its default, it could not be cast in judgment for attorney fees; and that as there remained no unadjudicated claim upon which relief could be granted, trial court improperly retained jurisdiction.

Affirmed in part, reversed in part and remanded.

1. United States ⇐53(9)

Judicial review of decision of Secretary of HUD to guarantee financing for initial development of new community was governed by the Administrative Procedure Act. 5 U.S.C.A. §§ 701 et seq., 706(2)(A); 28 U.S.C.A. § 1331(a).

2. United States ⇐53(9)

Appropriate standard of review of decision of Secretary of HUD to guarantee financing for initial development of new community was whether the Secretary's action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, and reviewing court would determine whether the agency considered all relevant factors in reaching its decision, or whether the decision itself represented a clear error of judgment. 5 U.S.C.A. § 706(2)(A).

3. United States ⇐53(9)

Where none of the facts necessary to sustain plaintiffs' attacks on HUD's compliance with the applicable federal statutes in deciding to guarantee financing for new community were unavailable to plaintiffs or within the exclusive possession or undisclosed by the agency, trial court properly required plaintiffs to establish their claims by a preponderance of the evidence as to each of their claims. 5 U.S.C.A. § 706(2)(A).

4. Courts ⇐406.3(24)

Findings, in action to prevent development of new community pursuant to program of housing and urban development, that HUD did not act arbitrarily, capriciously or unlawfully when it found the community to satisfy each statutory condition for federal financing guarantee were not clearly erroneous. New Communities Act of 1968, § 402 et seq., 42 U.S.C.A. § 3901 et seq.; Urban Growth and New Community Development Act of 1970, §§ 701–703, 712, 42 U.S.C.A. §§ 4501–4503, 4513.

5. Health and Environment ⇐25.5

HUD's commitment to guarantee $18,000,000 in bond obligations for development of new community pursuant to program of housing and urban development constituted a "major federal action" significantly affecting the quality of the human environment, subjecting that decision to the full disclosure provisions of the National Environmental Policy Act. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

See publication Words and Phrases for other judicial constructions and definitions.

6. Health and Environment ⇐25.10

Council on Environmental Quality guidelines providing 30-day period for circulation of impact statement for public comment, although highly persuasive, do not govern compliance with the National Environmental Policy Act. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

7. Health and Environment ⇐25.10
United States ⇐53(9)

HUD's commitment to guarantee bond obligations for new community, and HUD's environmental impact statement, were not fatally undermined by the direct participation of the developer and his experts in the underlying environmental and other studies. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

8. Health and Environment ⇐25.10

The National Environmental Policy Act does not permit the responsible federal agency to abdicate its statutory duties

by reflexively rubber-stamping an environmental impact statement prepared by others; the agency must independently perform its reviewing, analytical and judgmental functions and participate actively and significantly in the preparation and drafting process. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

9. Administrative Law and Procedure ⇐476

In absence of bad faith or misplaced reliance, an agency faced with numerous applications for assistance and endowed with finite internal resources to implement congressional policy cannot be expected to ignore useful and relevant information merely because it emanates from an applicant.

10. Health and Environment ⇐25.10

Guidelines of Council on Environmental Quality and the Environmental Protection Agency regulations regarding preparation of environmental impact statements contemplate submission of initial environmental information by the applicant to the agency. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

11. Health and Environment ⇐25.10

HUD did not improperly delegate its statutory responsibilities in preparing environmental impact statement for new community by reason of the participation of the developer and his experts in the underlying environmental and other studies. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

12. Health and Environment ⇐25.10

Inasmuch as district court's order holding in abeyance litigation concerning development of new community under housing and urban development program and developer's agreement to HUD's call for a moratorium on construction effectively maintained the status quo pending completion of addendum to HUD's environmental impact statement, it was not incumbent on court to require that HUD withdraw its

contingent commitment offer. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

13. Health and Environment ⇐25.10

While formally correct environmental impact statements and technical compliance with the National Environmental Policy Act and complimentary guidelines are required, an initial finding of noncompliance must not irrevocably preclude eventual compliance; compliance must be measured by the contents of the final statement. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

14. Health and Environment ⇐25.10

HUD's environmental impact statement for new community was not insufficient on theory it failed to examine the secondary or indirect environmental impacts from expected neighboring "parasite" developments; to set out a cost-benefit analysis of the project; to consider cumulative impacts; to discuss adequately the relationship between local short-term uses of the environment and maintenance and enhancement of long-term productivity; or to treat fully outside comments and opinions. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

15. Health and Environment ⇐25.10

That factors in determining environmental costs and risks with respect to development of new community under housing and urban development program are generally imprecise and unquantifiable does not render impact statement inadequately detailed. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

16. Health and Environment ⇐25.5

National Environmental Policy Act does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

17. Health and Environment ⇐25.10

Sufficiency of environmental impact statement under the National Environmental Policy Act must be judged in light of the nature of the federal action and the underlying implementing federal legislation. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

18. Health and Environment ⇐25.10

Agency providing environmental impact statement must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

19. Health and Environment ⇐25.10

HUD's environmental impact statement with respect to development of community lying on portion of zone of land taking surface waters to underground water-bearing formation supplying water for city of San Antonio was not insufficient by reason of failure to discuss either the acquisition of the recharge zone as a park at a prohibitive cost, or the elimination of all federal assistance to any development over the recharge zone. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

20. United States ⇐53(9)

Statute permitting HUD to plan large-scale projects on federally owned lands does not obligate HUD to search out a competing applicant willing to develop and finance a project on an alternate site or to work up a counterproposal of its own before it can pass on the merits of a properly submitted new community application. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

21. Health and Environment ⇐25.10

HUD's environmental impact statement pertaining to new community application fully complied with the National Environmental Policy Act where it furnished sufficient information to permit a reasoned choice of alternatives so far as environmental aspects were concerned. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

22. Health and Environment ⇐28

Precautions required by HUD to protect quality of water supplied to residents of city of San Antonio by area on which new community was to be constructed were adequate. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

23. Health and Environment ⇐28

Citizens' groups suing to prevent development of new community to be located astride portion of zone of land supplying water to city of San Antonio failed to state claim for violation of Federal Water Pollution Control Act. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 101(a), 102(a), 301, 309, 33 U.S.C.A. §§ 1251 et seq., 1251(a), 1252(a), 1311, 1319.

24. Federal Civil Procedure ⇐2737.6

In absence of proof that the private party controlled the government agency's actions or caused its default, private party cannot be cast in judgment for attorney fees as a result of the agency's shortcomings even if agency is immune from liability for financial redress.

25. Federal Civil Procedure ⇐2737.6

Citizens' groups which brought action which directly caused HUD's full compliance with National Environmental Policy Act on new community project could not recover attorney fees from developer which successfully defended the lawsuit and which was not shown to have been unreasonable or to have unduly protracted the litigation. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; 28 U.S.C.A. § 2412.

26. Courts ⇐30

Rendition of definitive judgment in suit to prevent development of new community under housing and urban develop-

ment program ended the litigable aspects of the dispute and, in absence of evidence indicating that HUD would fail to discharge faithfully its statutory functions, trial court improperly retained jurisdiction. 28 U.S.C.A. § 1331(a).

27. Health and Environment ⇐25.5

District court must abjure the role of a quasi-administrative agency for environmental affairs. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

28. United States ⇐53(9)

Judgment and grant of relief disposing of litigation seeking to prevent development of new community under housing and urban development program could compel parties to file in a convenient local public office such reports as they might in the future make that contain material of public interest. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

29. Courts ⇐281

Although mere voluntary cessation of allegedly illegal conduct does not moot a case, federal jurisdiction must be founded upon at least a mere possibility of recurrence which serves to keep the case alive.

Appeals from the United States District Court for the Western District of Texas.

Before WISDOM and CLARK, Circuit Judges, and GROOMS, District Judge.

CLARK, Circuit Judge:

An offer of commitment by the United States Department of Housing and Urban Development (HUD) to guarantee an 18 million dollar private bond issue for the development of San Antonio Ranch New Town (Ranch) spawned this environmentalist litigation against defendants James T. Lynn, Secretary of HUD, and San Antonio Ranch, Ltd., the developer.

Charging violations of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq., and the Urban Growth and New Community Development Act of 1970 (Title VII), 42 U.S.C. § 4501 et seq., four citizens groups (the Sierra Club, Citizens for a Better Environment, League of Women Voters of the San Antonio Area, and American Association of University Women, San Antonio Branch) and their individual members, as plaintiffs, sought declaratory and injunctive relief barring defendants from issuing or accepting either the bond guarantee or any other federal assistance supporting development of the Ranch until the proposed project complied with NEPA and Title VII. Thereafter, the district court permitted the Texas Water Quality Board to intervene on behalf of the defendants, and the Edwards Underground Water District, which had intervened along with Bexar County, Texas on behalf of the plaintiffs, amended its original complaint to allege that development of the Ranch also contravened the Water Pollution Prevention and Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq.

Depending upon which party's view is accepted, the Ranch will be either an urban planner's utopia incarnate or an environmental disaster of the first magnitude. As conceived by the developer, a limited partnership composed of individuals experienced in real estate, construction, financing and new town management, the Ranch will convert 9,318 acres of predominantly virgin Texas hill country land in the northwest quadrant of Bexar County, Texas into a "free standing" new community of 87,972 residents living in 28,676 housing units (41%—single family detached houses, 6%—townhouses, 45%—medium density apartments, and 8%—high density apartments), of which one-fourth will accommodate low and moderate income families, through staged construction over a 30-year period. The Ranch site, which is presently virtually undisturbed and primarily used for ranching, grazing and occasional hunting, is dominated topographically (85%) by hill country and rocky soil characterized by 100 to 200 ft. differen-

tials in elevation. The southern 1200 acres (15%) consists mainly of flat terrain and agriculturally productive soil. An expanding network of regional highways serving the area will be supplemented by an external mass transit system connecting the Ranch to downtown San Antonio, approximately 20 miles away, the South Texas Medical Center, a distance of 10 miles, the University of Texas at San Antonio, a 6-mile trip, and the San Antonio International Airport, currently a 25-minute drive. The developer will contract for essential municipal services and public utilities with the City of San Antonio, whose City Council has adopted a resolution favoring eventual annexation of the entire project.

More than half of the Ranch acreage will be devoted to residential development and internal roads. The project contemplates over 2200 acres of open space, which includes a 2,000 acre greenway system, two 18-hole golf courses, three recreational use lakes, neighborhood recreation centers with swimming pools and tennis courts and a continuous hiking and bicycle trail system. 12,750 employees are expected to work in two industrial and research and development parks totaling 1,234 acres. A 500 acre vocational training and technical center, featuring public or private affiliated educational and training facilities, will staff 430 employees, and it is estimated that 4,480 persons in public jobs will service the Ranch population. Of the 180 acres set aside for commercial use, 150 acres will be devoted to a town center that will act as the gateway to the entire Ranch, providing the focus of civic, entertainment, office employment and shopping activities. Two educational parks and 13 elementary school sites will cover 330 acres. In general the land use plan seeks to take maximum advantage of the area's variation in topography by clustering common or public facilities along an "activity belt," a major right-of-way loop that envelopes the community and laces its components together. The center of the Ranch forms a residential island and the network of canyons affords the basis for a continuous green belt system that will permit a person

to bicycle or walk or horseback ride from the town center to any point within the Ranch without crossing a major thoroughfare.

The spectre of environmental doom is raised by the fact that the proposed development lies astride a portion of the zone of land which takes surface waters to the Edwards Aquifer, an underground water bearing formation that is the sole water supply for the City of San Antonio and 1,000,000 area residents. The aquifer region has been estimated to be approximately 175 miles in length with a varying width of 5 to 45 miles, encompassing a crescent-shaped surface area of 3½ million acres that extends over more than 7 counties. Ground water flows freely (in terms of miles per day) in an easterly direction through the Edwards formation of extremely permeable limestone, which averages 500 feet in thickness, until it is cut by the Balcones fault system. Northwest of the fault the surface limestone is upthrown to form the Edwards Plateau. In this region, honeycombed with fissures and cracks, ground water percolates through the stratum and is found under normal, unconfined water-table conditions. Southeast of the fault line, however, the limestone formation is downthrown, sloping from a surface recharge area near the fault line south and east hundreds of feet below the surface, and overlaid with less permeable and younger rocks, which confine the ground water in the underground reservoir from which San Antonio draws its water supply.

The artesian reservoir is replenished annually with approximately 500,000 acre feet of water from three major sources. Most of the recharge is attributable to 14 surface streams on the Edwards Plateau that flow across fractures and joints in the fault zone, through which water filters down to the aquifer. This recharge zone varies in width from ½ to several miles and extends 80 or more miles above the Balcones fault system. It consists of many small pores and fissures inlaid among less permeable material. The second major source is underflow from one area of the reservoir that recharges

another. Least significant is the recharge produced from rain falling directly on the exposed "outcrops" of limestone in the upthrown region. This precipitation seeps through honeycombed passages and eventually filters its way into the reservoir.

Plaintiffs contend that if water entering the recharge zone is polluted, the entire aquifer will become contaminated. The Balcones Fault dissects the Ranch site latitudinally at the Haby Crossing Fault. Only about 13% of the annual rainfall on the site is eventually introduced to the underground reservoir. The rest is consumed by vegetation, evaporated or removed as surface run-off. Since none of the 14 major stream beds or recharge areas is located on the Ranch, the recharge emanating from the Ranch is generally estimated at only one-half of one percent of the total annual recharge to the aquifer.

The Ranch moved from the drawing board to the bureaucracy when the developer approached HUD in February of 1970 to explore the possibilities of federal assistance under Title VII. Marketing studies had shown that the development envisioned by the preliminary master plan would capture 15% of Bexar County's projected growth. During the prior decade almost half of the county's total population increase (143,000) had occurred in the northwest quadrant, whose influx of residents was expected to continue. Favorably impressed with the planning studies and pre-application proposal, HUD invited the developer to submit a formal application. Eight months later HUD's Office of New Community Development received the formal application and fee of 5,000 dollars and undertook a full agency review of the project.

Early concern for the integrity of the aquifer surfaced in many quarters. At HUD's suggestion the developer retained a geologist-hydrologist, Dr. L. J. Turk, to examine the project. A review of the Ranch was conducted by the Alamo Area Counell of Governments, a regional multi-governmental planning organization composed of 16 representatives from the

Edwards Water District, Bexar County and the 11 surrounding counties, which endorsed the project subject to two subsequently adopted conditions: (1) that HUD require thorough environmental impact studies, particularly as to the effect of storm water run-off; and (2) that the sanitary sewer system of the Ranch be connected and treated off the site by the City of San Antonio's regional waste water system. The Texas Water Quality Board and San Antonio city officials were informed of and commented upon the environmental hazards to the aquifer and the steps being taken to protect it. A team of HUD New Community Development staff members, including a civil engineer, a lawyer, an economist, an urban planner, a financial expert and an architect, was formed to prepare an environmental impact statement. The internal agency review of the Ranch's application culminated in a favorable Title VII critique of the project by the Assistant HUD Secretary for Community Planning Development, who submitted his report to the Board of Directors of HUD's Community Development Corporation in August of 1971 before the draft impact statement was circulated for public comment on September 13.

Of 13 public agencies solicited, 7 submitted written comments that were incorporated with comments volunteered by 9 other agencies or groups, including some of the plaintiffs, into the "final" impact statement issued on January 20, 1972 for further circulation and public comment.[1] Just over one month later, on February 23, 1972, convinced that the Ranch was eligible under the Act for a federal financing guarantee of up to 18,000,000 dollars, HUD proffered an offer of commitment that was contingent upon, *inter alia*, the developer's agreement to (1) a moratorium prohibiting development over the recharge zone of the aquifer until completion of a compre-

1. In December of 1971 the Edwards Underground Water District, the San Antonio Independent School District, the Bexar County Commissioners Court and the San Antonio River Authority adopted resolutions opposing urban development over the aquifer. Each resolution was included in an August 1972 addendum to the final environmental impact statement.

hensive environmental study of the recharge zone by the developer and until approval by the HUD Community Development Board and the Texas Water Quality Board of the measures proposed to protect the natural conditions disclosed by the study, (2) review and comment thereon by a public and interagency board organized to the satisfaction of HUD, and (3) the adoption of treatment methods and other continuing measures such as the monitoring of water quality, required by the Community Development Board and the Texas Water Quality Board.

On the same date plaintiffs filed their complaint in this action and sought a temporary restraining order. Without reaching the merits, the district court granted defendants' motion to hold the case in abeyance until the developer had satisfied the conditions in the offer of commitment and executed a project agreement with HUD. Subsequently, HUD formed the San Antonio Water Quality Advisory Review Board, composed of representatives from 18 public agencies and Bexar County, which conducted four separate public meetings and examined the impact of the project on the aquifer. This group inspected four reports submitted by Dr. Turk and the developer's other experts concerning continued studies of storm water and ground water quality at the Ranch, geological mapping of the site and soil renovation of storm water. It also surveyed the developer's plans for sanitary sewage collection and treatment facilities; transportation and storage of dangerous liquids; solid waste storage, collection and disposal; storm water controls; water quality monitoring system; and the legal controls supporting the inspection and enforcement of environmental quality programs.

In addition, HUD retained Dr. Henry V. Beck, a Kansas State University geologist, who, assisted by associates with expertise in environmental health engineering, hydrology and soil mechanics, independently reviewed the environmental studies and aspects of the entire project. Citations of approv-

al of the Ranch by the advisory board and Dr. Beck and their recommendations for improving environmental controls over the aquifer and the water quality monitoring system were forwarded to HUD for consideration and inclusion with additional ecological and the underlying scientific studies in an addendum to the "final" impact statement, which was circulated on August 24, 1972 among 38 public agencies or groups for additional study and comment. The Alamo Area Council of Governments, the San Antonio City Council, Water and Public Service Boards, the Texas Water Quality Board, the Governor's office and the State Department of Health approved the project as environmentally sound and consistent with regional land use planning. In October HUD concluded that the developer had satisfied each of the conditions contained in the letter of commitment and proceeded to commence negotiations leading to a project agreement.

After lengthy pre-trial maneuvering and assimilation of 9 days and 1920 pages of trial testimony, which generated voluminous exhibits, including a seven volume administrative record and three impact statements, the district court denied the relief sought by plaintiffs and entered judgment for the defendants, concluding that HUD had complied with the provisions of each federal statute. Furthermore, the court resolved to retain jurisdiction over the lawsuit for so long as might be necessary to ensure that the proposed environmental safeguards are fully instituted and implemented, and to require the parties to file with the court copies of all data and reports relating to the Ranch and other developments in the surrounding area. Finally, counsel for the plaintiffs were awarded 20,000 dollars in attorneys' fees, costs and expenses to be paid by the defendant developer. Sierra Club v. Lynn, 364 F.Supp. 834 (W.D.Tex.1973).

Plaintiffs appeal from the decision on the merits for defendants, renewing each of their statutory contentions, and asserting that the court improperly saddled them with the burden of proof. They also appeal from the amount of the attorneys'

fees award. The developer cross-appeals from the grant of such fees against it, and Secretary Lynn cross-appeals from the district court's determination to retain jurisdiction. For the reasons that follow, we affirm the decision of the court below on the merits, and reverse its award of attorneys' fees and its retention of jurisdiction.

[1, 2] The district court correctly ruled that it was vested with jurisdiction under 28 U.S.C. § 1331(a) and that plaintiffs possessed standing, see Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). It also properly concluded that judicial review of the Secretary's substantive Title VII decision to guarantee financing for initial development of the Ranch project is governed by the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq. Since neither Title VII nor the APA requires the agency to conduct a hearing or make formal findings when passing on new community applications, the appropriate standard of review is whether the Secretary's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). Under this standard the appellate court must determine whether the agency considered all relevant factors in reaching its decision, or whether the decision itself represents a clear error in judgment.

> Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The court must then determine, according to the standards set forth in §§ 101(b) and 102(1) of the Act, whether "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." Calvert Cliffs' Coordinating Committee v. U. S. Atomic Energy Commission, 146 U.S.App. D.C. 33, 449 F.2d 1109, 1115 (1971).

Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 300 (8th Cir. 1972), cert. denied, 412 U.S. 931, 93 S.Ct. 2749, 37 L.Ed.2d 160 (1973). "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971).

[3] In a motion to the trial court plaintiffs asserted that "once a prima facie showing has been made that the federal agency has failed to adhere to the requirements of NEPA, the burden must, as a general rule, be laid upon this same agency which has the labor and public resources to make the proper environmental assessment and support it by a preponderance of the evidence contained in the impact statement." Sierra Club v. Froehlke, 359 F.Supp. 1289, 1335 (S.D.Tex.1973), reversed sub nom., Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974). Without formally responding, the district court apparently applied the standard burden of proof—plaintiffs were required to establish their claims by a preponderance of the evidence without any tactical shifting of that burden. Since none of the facts necessary to sustain plaintiffs' attacks on HUD's compliance with the applicable federal statutes were unavailable to the plaintiffs or within the exclusive possession of or undisclosed by the agency, the district court properly imposed the standard evidentiary burden on plaintiffs as to each of their claims. Sierra Club v. Callaway, 499 F.2d 982, 992 (5th Cir. 1974); see Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974).

I.

The Urban Growth and New Community Development Act

Increasing concern over the deterioration of urban life led Congress to enact The Urban Growth and New Community Development Act as Title VII of the Housing and Urban Development Act of 1970, Pub.L. No. 91-609, 84 Stat. 1791, expanding a similar program that was authorized by the Housing and Urban Development Act of 1968, see 42 U.S.C.

§ 3901 et seq. Over the last century, the increasingly mobile quality of life in America has produced a pattern of population redistribution in which the migration of persons from rural areas to a small number of densely populated, congested central cities is followed by the flight of middle and higher income families and businesses from these urban centers to the suburbs. This pattern of movement has resulted in a polarization of the residents of city and suburbia by income, race, education, social philosophy and life style.

In order to treat the source rather than the symptoms of such social, economic and environmental problems, Title VII was designed (1) "to provide for the development of a national urban growth policy," 42 U.S.C. §§ 4501–4503, and (2) "to encourage the rational, orderly, efficient, and economic growth, development, and redevelopment of our States, metropolitan areas, . . . and communities in predominantly rural areas . . . [and] the prudent use and conservation of our natural resources by assisting public and private efforts in the development of well-planned, comprehensive new communities that will contribute to better environments, produce improved living conditions, add to the supply of adequate housing, especially for persons of low and moderate income, promote sound economic growth and employment and provide a viable alternative to disorderly urban growth. 42 U.S.C. § 4501; *see also* 42 U.S.C. § 4511(f). To achieve its broad commitment, Congress envisioned that the federal government, acting through the Community Development Corporation, 42 U.S.C. § 4532, would assist four general types of new communities:

(1) Economically balanced new communities within metropolitan areas, which would serve as alternatives to urban sprawl;

(2) Additions to existing smaller towns and cities which can be economically converted into growth centers to prevent decline and accommodate increased population;

(3) Major new-town-in-town developments to help renew central cities, including the development of areas adjacent to existing cities, in order to increase their tax base; and

(4) Free standing new communities where there is a clear showing of economic feasibility, and which would be built primarily to accommodate expected population growth.

H.R.Rep. No. 91–1556, U.S.Code Cong. & Admin.News, 91st Cong., 2d Sess., at pp. 5582, 5587–5588 (1970). As a result of its study of the problem, Congress found that the development of such new communities on a national scale had been crippled by the financial and administrative difficulties "of raising a large initial investment which would yield a delayed, irregular cash return; of assembling suitable sites of sufficient size; and in coordinating site and related improvements among all involved public and private sectors," Sierra Club v. Lynn, *supra*, 361 F.Supp. at 838; *see* 42 U.S.C. § 4511(e). Thus Congress provided in the Act for several forms of federal assistance including guarantees of the debt obligations of public and private new community developers to assist in financing land acquisition and development and in constructing public facilities, 42 U.S.C. § 4514.[2]

2. The eligibility requirements for Title VII financing guarantees are codified at 42 U.S.C. § 4513:

> (a) A new community development program is eligible for assistance under this part only if the Secretary determines that the program (or the new community it contemplates)—
>
> (1) will provide an alternative to disorderly urban growth, helping preserve or enhance desirable aspects of the natural and urban environment or so improving general and economic conditions in established communities as to help reverse migration from existing cities or rural areas;
>
> (2) will be economically feasible in terms of economic base or potential for economic growth;
>
> (3) will contribute to the welfare of the entire area which will be substantially affected by the program and of which the land to be developed is a part;
>
> (4) is consistent with comprehensive planning, physical and social, determined by the Secretary to provide an adequate basis for evaluating the new community development program in relation to other plans (including State, local, and private plans) and activities involving area population, hous-

After a developer has successfully traversed the application process and accepted an offer of commitment, the terms and conditions under which he must operate are negotiated with HUD and executed in a project agreement. A trust indenture and a development plan are required and must set out (i) all physical, environmental, planning and construction commitments over the 30-year development period, (ii) social goals and special features of the project, (iii) special studies required of the developer with respect to technological innovations and other aspects of the project incapable of resolution prior to execution, and (iv) the pace, scope and detail of the developer's undertakings in terms of 1-year, 3-year and long-term periods. These documents are incorporated into the project agreement and, hence, are enforceable at law. In addition, the developer is required each year to submit a new 1-year and 3-year plan and, if changed conditions warrant substantial alterations, a revised long-term plan. Substantial changes in

> ing and development trends, and transportation, water, sewerage, open space, recreation, and other relevant facilities;
>
> (5) has received all governmental reviews and approvals required by State or local law, or by the Secretary;
>
> (6) will contribute to good living conditions in the community, and that such community will be characterized by well balanced and diversified land use patterns and will include or be served by adequate public, community, and commercial facilities (including facilities needed for education, health and social services, recreation, and transportation) deemed satisfactory by the Secretary;
>
> (7) makes substantial provision for housing within the means of persons of low and moderate income and that such housing will constitute an appropriate proportion of the community's housing supply; and
>
> (8) will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services.
>
> (b) A new community development program approved for assistance under this part shall be undertaken by a private new community developer or State land development agency approved by the Secretary on the basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion.

any part of the development plan require approval by the Secretary.

The dynamic nature of the project's development process is intended to encourage flexibility in planning and to take advantage of new technology, research and innovation in the design and execution of new community development. A specific provision in the plan, which states that "[t]he developer shall comply with such further reasonable standards for environmental quality control as the Secretary may prescribe after consultation with other federal agencies pursuant to the National Environmental Policy Act of 1969," assures that other federal agencies retain influence over the developer's activities regarding environmental quality after the agreement has been executed. Moreover, another provision extends the developer's commitment to maintain environmental quality control for such additional period of time after completion of development as the Secretary may determine to be appropriate, and HUD states that it will prepare draft and final environmental statements with respect to any subsequent major actions connected with any such project, *i. e.* actions that have significant environmental quality implications.

[4] Plaintiffs contend that the Ranch (1) does not comport with the eight goals of the national urban growth policy announced by Congress;[3] (2) will promote the ten undesirable consequences which Congress found to result from unregulat-

3. (d) The Congress further declares that the national urban growth policy should—
   (1) favor patterns of urbanization and economic development and stabilization which offer a range of alternative locations and encourage the wise and balanced use of physical and human resources in metropolitan and urban regions as well as in smaller urban places which have a potential for accelerated growth;
   (2) foster the continued economic strength of all parts of the United States, including central cities, suburbs, smaller communities, local neighborhoods, and rural areas;
   (3) help reverse trends of migration and physical growth which reinforce disparities among States, regions, and cities;

ed patterns of urban development,[4] and (3) fails to meet the eligibility requirements for federal assistance under the Act. The district court concluded that HUD did not act arbitrarily, capriciously or unlawfully when it found the Ranch to satisfy

> (4) treat comprehensively the problems of poverty and employment (including the erosion of tax bases, and the need for better community services and job opportunities) which are associated with disorderly urbanization and rural decline;
> (5) develop means to encourage good housing for all Americans without regard to race or creed;
> (6) refine the role of the Federal Government in revitalizing existing communities and encouraging planned, large-scale urban and new community development;
> (7) strengthen the capacity of general governmental institutions to contribute to balanced urban growth and stabilization; and
> (8) facilitate increased coordination in the administration of Federal programs so as to encourage desirable patterns of urban growth and stabilization, the prudent use of natural resources, and the protection of the physical environment.
> 42 U.S.C. § 4502(d).

4. (b) The Congress further finds that continuation of established patterns of urban development, together with the anticipated increase in population, will result in (1) inefficient and wasteful use of land resources which are of national economic and environmental importance; (2) destruction of irreplaceable natural and recreational resources and increasing pollution of air and water; (3) diminished opportunity for the private homebuilding industry to operate at its highest potential capacity in providing good housing needed to serve the expanding population and to replace substandard housing; (4) costly and inefficient public facilities and services at all levels of government; (5) unduly limited options for many of our people as to where they may live, and the types of housing and environment in which they may live; (6) failure to make the most economic use of present and potential resources of many of the Nation's smaller cities and towns, including those in rural and economically depressed areas, and decreasing employment and business opportunities for their residents; (7) further lessening of employment and business opportunities for the residents of central cities and of the ability of such cities to retain a tax base adequate to support vital services for all their citizens, particularly the poor and disadvantaged; (8) further separation of people within metropolitan areas by income and by race; (9) further increases in the distances between the places where people live and where they work and find recreation; and (10) increased cost and decreased effectiveness of public and private facilities for urban transportation.
42 U.S.C. § 4511(b).

each section 4513 condition for the $18,000,000 dollar federal financing guarantee.[5] None of these district court findings can be characterized on this record as clearly erroneous. Furthermore, the national urban growth policy and the detrimental effects of present patterns which Congress codified operate only as guideposts to inform the Secretary's discretion and judicial review of his substantive decision. Neither creates any judicially enforceable rights.

Urging that HUD made no studies of the Ranch's impact on San Antonio urban problems (transportation facilities, minority and low income distribution, inner city tax base, balanced growth or revitalization of the central city), plaintiffs argue that the Ranch cannot be consistent with comprehensive planning for the entire urban area, as required by section 4513(a)(4) and HUD regulations (since no such plan exists),

5. The findings were:
(1) The project will provide an alternative to disorderly urban growth;
(2) It will be economically feasible, in that it will capture more than 15% of the projected growth of Bexar County, because of its wide range of housing amenities and the superior environment;
(3) It will contribute to the welfare of the entire area, as existing septic tanks will be replaced with storm and sanitary sewers, and as industrial and commercial facilities will be placed in a setting encompassing a broad price range of housing;
(4) It is consistent with comprehensive physical and social planning;
(5) It has received all governmental reviews and approvals required by State or local law;
(6) It will contribute to desirable living conditions in the community, and will be characterized by well balanced and diversified land use patterns, and will include or be served by adequate public, community, and commercial facilities;
(7) It makes substantial provision for housing within the means of persons of low and moderate income;
(8) It will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services; and
(9) A basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion has been shown.
Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839.

and that Bexar County, which must become responsible for governing and servicing the development, was never asked to approve the Ranch, as mandated by section 4513(a)(5).

The administrative record demonstrates that from the beginning HUD conceived of the Ranch as an integral element of the entire San Antonio community. The myriad economic, marketing, environmental and urban studies indicated that the project would provide a viable alternative (preserving and enhancing the existing natural amenities) to the rapid and disorderly urban growth projected for the northwest quadrant of Bexar County, an area devoid of goverhmental land use regulations or comprehensive water resource management planning. It is anticipated that this growth phenomenon will be exacerbated by the nearby construction of the University of Texas at San Antonio and the South Texas Medical Center. Thus, the orderly development of the Ranch should advance the goals of Title VII by retarding the expected and otherwise inevitable urban sprawl over the aquifer through implementation of a comprehensive land use plan which institutes demanding environmental controls in an ecologically sensitive area as well as by contributing to the welfare of the entire San Antonio community.

HUD evaluated the project's feasibility and its interrelation with the City of San Antonio by examining regional growth trends, population and employment distribution, market potentials, adequacy of regional transportation facilities and the long-term fiscal and economic impact of the Ranch on its adjacent political jurisdictions. These areas of concern were treated in the August 1971 report of the Assistant Secretary of HUD to the Community Development Board of Directors. He examined and the Board approved the Ranch with respect to each requirement of section 4513 and all applicable HUD regulations. To allay fears that the Ranch would counteract efforts to revitalize the downtown area of San Antonio, the developer submitted expert studies to the City Council that indicated a minimally harmful, if not an overall beneficial,

economic impact on the city and its tax base from the project. As a result the City Council rescinded its prior unfavorable position as to the Ranch and in February of 1972 voted to adopt a resolution supporting annexation of the Ranch in the future and to execute an agreement of cooperation with the developer: (a) to institute measures to protect the Edwards reservoir from pollution, (b) to channel all urban-type federal grants through the City, (c) to seek assistance from the developers with the planning, analysis and feasibility studies for a possible Title VII new-town-in-town project in San Antonio, and (d) to provide water, gas, electricity, sewerage and other municipal services to the Ranch under contract with the developer. In responding to comments to the "final" environmental impact statement, HUD stated that it would give full consideration to a new-town-in-town community in San Antonio regardless of the final action it took as to the Ranch.

Not only did both HUD and the developer endeavor to work closely and cooperate fully with state, local and city officials, the record also shows that the Ranch project "is consistent with comprehensive planning . . . determined by the Secretary to provide an adequate basis for evaluating the new community development program in relation to other [state, local and private] plans and activities . . .," 42 U.S.C. § 4513(a)(4), and "has received all governmental reviews and approvals required by State or local law, or by the Secretary," 42 U.S.C. § 4513(a)(5).

At the project's inception, no governmental entity exercised planning authority over the proposed site. "[N]either governmental controls over land use nor comprehensive and cohesive water resource management plans then existed in this area of Bexar County." Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839. Bexar County, which was the only governmental body with jurisdiction over the entire ranch, had only residential subdivision regulations. Consequently, HUD selected the Ala-

mo Area Council of Governments to conduct a review of the Ranch in compliance with the Office of Management and Budget Circular A–95, which in general requires that an applicant for Title VII assistance notify the appropriate clearing house for the area in which the project is located of its intent to apply for such assistance in order to afford the clearing house and other interested local agencies an opportunity to comment on the proposed project. The district court determined that "the Alamo Area Council of Governments . . ., the Water Board of the City of San Antonio, the City of San Antonio Public Service Board, the Texas Water Quality Board, the Governor's office, and the Northside Independent School District had reviewed the project and decided that [the Ranch] was consistent with the comprehensive regional plan." 364 F.Supp. at 839.

Title VII does not state that the existence of a comprehensive regional land use plan is a condition precedent to federal assistance or that if no such plan is in effect, the Secretary must exercise his statutory authority to make comprehensive planning grants available to official governmental planning agencies where rapid urbanization is expected to occur on property to be developed as a new community, *see* 40 U.S.C. § 461. In this vein, draft HUD regulations provide that "the area within which a new community is to be situated must be covered by a comprehensive areawide plan *or by ongoing planning promulgated or carried on by a duly authorized agency*." Proposed HUD Reg. § 32.7(f), 36 Fed.Reg. 14208 (1971) (emphasis added). These regulations also state that the comprehensive planning for the area must, in the secretary's judgment, be sufficiently detailed to provide a reasonable basis for evaluating the relationship of the proposed new community to other state, local and private plans and activities and that in those areas with a regional planning agency certified by the secretary, consistency must be found between the new community and the planning conducted by such agencies.

Plaintiffs do not assert that the Alamo Area Council was improperly certified by HUD or defaulted in its A–95 and regional planning responsibilities. There is no evidence that the council (among whose 16 members were representatives from plaintiff-intervenors, Edwards Underground Water District and Bexar County) inadequately discharged its planning and reviewing functions or erroneously determined that the Ranch was a viable project. Its conclusions were independently corroborated by various other local governmental agencies and were approved by the district court. Finally, that no official endorsement of the Ranch by Bexar County is required by state law is verified by a letter to HUD approving the Ranch from Bexar County Commissioners Court Judge Blair Reeves, who stated that though the county had no planning or zoning responsibility under existing state law, he found the project to be consistent with the San Antonio metropolitan area goals. This point was mooted in April of 1974 when the City Council of San Antonio voted to extend the city's extra-territorial jurisdiction over the Ranch from 58% to 100% of the proposed site.

The record before us does not support the claim that HUD failed to consider all relevant Title VII factors in reaching its decision or that the decision itself manifests a clear error in judgment. The legislative history of Title VII and HUD regulations thereunder clearly contemplate federal assistance for "free standing and self-sufficient new communities away from existing urban centers where there is a clear showing of economic feasibility, primarily . . . to accommodate [expected] population growth," as well as for new communities in metropolitan areas that are designed to combat urban sprawl and to renew deteriorating central cities. *See* proposed HUD Reg. § 32.7(a), 36 Fed.Reg. 14207 (1971). We hold that Secretary Lynn acted neither arbitrarily nor capriciously, nor failed to act in accordance with law when he determined to grant the developers of the Ranch federal assistance under the Urban Growth and New Community Development Act.

II.

National Environmental Policy Act of 1969

[5] NEPA was enacted to promote a national policy of "productive and enjoyable harmony between man and his environment," 42 U.S.C. § 4321, by demanding attention to environmental values and instituting an implementing methodology which would assure that these values were incorporated in agency planning and decision making processes. Because HUD's commitment to guarantee 18,000,000 dollars in bond obligations for the Ranch constituted a major federal action "significantly affecting the quality of the human environment," that decision became subject to the "full disclosure" provisions of NEPA, 42 U.S.C. § 4332(2)(C). As a result HUD filed three environmental impact statements—a draft statement on September 13, 1971, a final statement on January 20, 1972, and an addendum to the final statement on August 24, 1972.

The district court concluded that the final statement, as supplemented by the addendum, "though possibly not completely exhaustive in every respect, is sufficient to permit a reasoned decision as to the environmental effects of [the Ranch]" and "meets all the requirements for the 'detailed statement' required by NEPA . . . ." 364 F.Supp. at 842. Furthermore, the court determined that the Secretary's substantive commitment decision was neither arbitrary nor capricious nor an abuse of discretion since "HUD has complied with the goal of NEPA, . . . by '[using] all practicable means, consistent with other essential considerations of national policy' to carry out our nation's environmental policy." 364 F.Supp. at 844.

Plaintiffs attack these findings, contending that (1) the agency's offer of commitment to the developer was in violation of HUD regulations and Council on Environmental Quality guidelines since it was extended before the thirty-day period for circulation of the impact statement for public comment had expired; (2) the final statement and addendum

are unacceptable because both were improperly delegated to and represent the work product of the developer and his experts with little independent analysis or input from HUD and because the offer of commitment was not withdrawn pending completion of the additional environmental studies; (3) the supplemented final statement does not measure up to the requirements of NEPA; and (4) HUD's decision of commitment is arbitrary and capricious since it gave insufficient weight and consideration to environmental factors. In related contentions, plaintiffs assert that HUD's treatment of alternatives to the proposed project in the statement was deficient and that in accordance with the Urban Growth and New Community Development Act, HUD was obligated to consider and develop the suitability of alternative sites for the project.

To support their first issue—procedural irregularities at the agency vitiated HUD's offer of commitment—plaintiffs point to an October 1971 decision by the Community Development Board of Directors "to authorize an offer of commitment at the earliest appropriate time" and to a "draft" offer of commitment allegedly communicated from HUD to the developer on February 15, 1972, a date well before expiration of the thirty-day statement circulation period required by guidelines of the Environmental Protection Agency, 40 C.F.R. § 6.15 (1973), the Council on Environmental Quality, 40 C.F.R. § 1500.11(b), 38 Fed.Reg. 20556 (1973), and HUD regulations, HUD Handbook 1390.1(5.)(d.)(2), 38 Fed.Reg. 19187 (1973). Furthermore, plaintiffs argue that since the final statement, dated and filed with the Council on Environmental Quality on January 20, was not received until three days later, the February 23 offer of commitment also preceded expiration of the circulation period.

[6] The short answer is that the Council on Environmental Quality guidelines, although highly persuasive, do not govern compliance with NEPA. Sierra Club v. Callaway, *supra*; Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir.

1973). The draft HUD Title VII Regulations, which have never been formally adopted, were uppermost in the minds of the Community Development Board of Directors at their February 15 meeting when they authorized Assistant Secretary Jackson "to determine at the expiration of the thirty-day period whether an offer of commitment should be issued . . . ." More importantly, the record is clear that the February 23 offer of commitment followed the circulation of the impact statement to the Council on Environmental Quality and other public agencies and groups by more than the specified thirty days. Finally, that conditional offer was lawfully issued pursuant to 42 U.S.C. §§ 4513, 4514, and draft HUD regulations. Proposed HUD Reg. § 32.23, 36 Fed.Reg. 14212–13 (1971).

[7, 8] Neither is the commitment offer or the impact statement fatally undermined by the direct participation of the developer and his experts in the underlying environmental and other studies. There is no NEPA prohibition against a state agency, financially interested private contractor or a new community applicant providing the federal agency, which must of necessity work closely with these parties, data, information, reports, groundwork environmental studies or other assistance in the preparation of an environmental impact statement. *See* Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849 (8th Cir. 1973); Citizens Environmental Council v. Volpe, 484 F.2d 870 (10th Cir. 1973), cert. denied, —— U.S. ——, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974). NEPA demands only that "the applicable federal agency must bear the responsibility for the ultimate work product designed to satisfy the requirement of § 102(2)(C)." Life of the Land v. Brinegar, 485 F.2d 460, 467 (9th Cir. 1973), cert. denied, —— U.S. ——, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974). NEPA's commands, however, do not permit the responsible federal agency to abdicate its statutory duties by reflexively rubber stamping a statement prepared by others. The agency must independently perform its reviewing, analytical and judgmental functions and participate actively and significantly in the preparation and drafting process. *See* Greene County Planning Board v. F.P.C., 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed.2d 90 (1972). HUD did no less here.

Non-degradation of the aquifer and ranch environment were paramount considerations throughout the entire HUD review of the Ranch application. To this end an inter-disciplinary team of New Communities Development staff members prepared and compiled each of the three environmental statements after independently reviewing data, information and comments provided by the developer's experts and other interested public agencies and groups. To obtain further verification, HUD retained a geologist and his staff of three associates to supervise and analyze the supplemental environmental studies and review every aspect of the project, especially the water quality monitoring program and the proposed environmental controls. His report and favorable conclusions were included with those studies in the addendum prepared by the New Communities Development staff.

[9–11] In the absence of bad faith or misplaced reliance, an agency faced with numerous applications for assistance and endowed with finite internal resources to implement congressional policy, cannot be expected to ignore useful and relevant information merely because it emanates from an applicant. This does not mean it may substitute the applicant's efforts and analysis for its own. The guidelines of the Council on Environmental Quality and the Environmental Protection Agency regulations regarding preparation of impact statements clearly contemplate submission of initial environmental information by the applicant to the agency. *See* EPA Reg., 40 C.F.R. § 6.21(c) (1973); CEQ Guidelines, 40 C.F.R. § 1500.7(c), 38 Fed.Reg. 20553 (1973); *see also* HUD Handbook 1390.1(5.), 38 Fed.Reg. 19184–87 (1973). In view of HUD's active participation and independent preparation of the impact statement and addendum, the district court did not

err when it failed to conclude that the agency improperly delegated its statutory responsibilities to the developer.

Whenever an agency decision to act precedes issuance of its impact statement, the danger arises that consideration of environmental factors will be *pro forma* and that the statement will represent a *post hoc* rationalization of that decision. NEPA was intended to incorporate environmental factors and variables into the decisional calculus at each stage of the process. "This means that draft statements on administrative actions should be prepared and circulated for comment prior to the first significant point of decision in the agency review process." CEQ Guidelines, 40 C.F.R. § 1500.7(a), 38 Fed.Reg. 20552 (1973). The impact statement is the central, independent component of NEPA's decision-making methodology since it "provides a basis for (a) an evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action." Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 458 F.2d 827, 833 (1972).

[12, 13] In this case, HUD's draft statement preceded its first significant decision, the October 1971 authorization by the Community Development Board of Directors of an offer of commitment at the earliest appropriate time. However, that the draft and final statement were totally inadequate under NEPA is signaled by HUD's conditioning its offer on a comprehensive study of the recharge zone and on Community Development and Texas Water Quality Board approval of the measures to be instituted to protect the aquifer. The "final" impact statement itself acknowledged the lack of knowledge regarding the effect on the aquifer of storm water run-off, which it identified as the major pollution threat, and called for further investigation before, during and after construction of the Ranch. Because the district court's order holding this litigation in abeyance and the developer's agreement to Hud's call for a moratorium on construction effectively maintained

the status quo pending completion of the August addendum, it was not incumbent on the court below to require that HUD withdraw its commitment. The offer was contingent, stating that the Community Development Board "is under no obligation to enter into a project agreement or to guarantee your debt obligation until and unless" the Board has affirmatively found that each specified condition has been met. Post-submission efforts to rehabilitate the statement to comport with NEPA's provisions or to minimize adverse environmental consequences and maximize benefits should not be barred by initial inadequacies. The goal of NEPA is a better environment. While formally correct statements and technical compliance with the Act and complimentary guidelines are required, an initial finding of section 102 noncompliance must not irrevocably preclude eventual compliance. HUD's compliance with NEPA must be measured by the contents of the final impact statement as supplemented by the later addendum.

[14] As a further point in their multifaceted appellate offensive, plaintiffs contend that the supplemented statement did not comply with section 102(2)(C) because it failed (1) to examine the secondary or indirect environmental impacts from expected neighboring "parasite" developments; (2) to set out a cost-benefit analysis of the project; (3) to consider cumulative impacts; (4) to discuss adequately the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) to treat fully outside comments and opinions. A cursory examination of the impact statement, addendum and supporting documents demonstrates each of these assertions' lack of substance.

The supplemented statement pointed to statistics indicating continued explosive population growth in the northwest quadrant of Bexar County and the probabilities that the influx of unregulated, low density subdivisions would be accelerated by the expanded network of regional highways and that the

Ranch would tend to attract parasite settlements by as many as 40,000 persons along its outskirts. The statement also warned of the concomitant need for appropriate land use and zoning controls to protect the aquifer from accompanying septic tank discharge and other pollution and to insure that such developments were consistent with the plan, patterns and controls established for the Ranch. The developer promised to cooperate with the Alamo Area Council, the City of San Antonio and the Texas Water Quality Board in establishing the necessary regulatory controls. Moreover, in responding to the district court's order requiring the Edwards Water District and Texas Water Quality Board to file with the court semi-annual reports as to development over the aquifer, its effect and the environmental control measures being implemented, the Water Board indicated that it intended to incorporate virtually all of the HUD requirements imposed on the Ranch into an order regulating all development activities over the aquifer.

[15, 16] Similarly, exhibits in the addendum disclosed the expected cumulative impact of the Ranch on population distribution, land use patterns and the financial and economic resources of Bexar County and the surrounding areas. Unavoidable adverse environmental effects, irretrievable commitments of resources and other environmental costs and risks were identified and found not to outweigh the benefits of the Ranch in protecting and enhancing the Ranch site as well as avoiding the onset of urban sprawl. That the factors in this cost-benefit analysis are generally imprecise and unquantifiable does not render the result inadequately detailed. NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula. Land use regulation over the aquifer was seen to advance its long-run productivity as against the adverse short- and long-term effects of uncontrolled development. Advance planning, careful monitoring of water quality and stringent environmental controls should assure the continued integrity of the aquifer if such measures are extended throughout the recharge zone. Finally, all comments received as to each statement during the circulation period were attached and included in the supporting documentation. Many of the responses to the draft statement and HUD's replies thereto are reflected in the two succeeding statements.

"NEPA requires that an agency must—to the *fullest* extent possible under its other statutory obligations—consider alternatives to its action which would reduce environmental damage." Calvert Cliffs' Coordinating Committee v. AEC, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1128 (1971). In its discussion of alternatives, HUD proposed (a) taking no action, (b) requiring actions of a substantially different nature that would provide similar benefits with varying environmental impacts and (c) approving a project of different size, scope or design with less significant environmental impacts. The no action alternative was unattractive since anticipated uncontrolled development over the recharge zone posed a greater threat to the aquifer. Just as adverse impacts could not be avoided by refusing financial assistance to the Ranch, neither could they be precluded by delaying the project 3 to 5 years until proposed but unenacted state or federal land use legislation might result in a comprehensive plan for the recharge zone. The second alternative encompassed approving the project on a site off the recharge zone. This proposal was discarded because it would produce the same adverse environmental results as no action and would not satisfy the demand for housing in the northwest quadrant of Bexar County. Approval of a project smaller in scope or of less costly design on the Ranch site under the third alternative would not provide the housing necessary to accommodate most of the area's potential residents. Neither would it incorporate the economies of planning and funding to be found in a larger project nor exert such a beneficial influence on the surrounding area.

Asserting that HUD's discussion of alternatives is conclusory, superficial and self-serving, plaintiffs contend that the

impact statement is fatally deficient because it fails to mention the acquisition of the recharge zone as a park or game preserve, the modification or elimination of federal assistance programs so as to discourage development over the recharge zone, the development of a different type or design of new community in another area of Bexar County, or any consideration or development of alternative sites for the project off environmentally sensitive areas. In a related contention, plaintiffs argue that Title VII, which is a guidepost for application of NEPA in this urban-suburban setting, compels HUD to consider alternative locations for new communities in evaluating an application for Title VII assistance.

[17, 18] It is true that the scope and extent of HUD's treatment of alternatives was less than exhaustive. Its sufficiency under NEPA, however, must be judged in light of the nature of the federal action and the underlying implementing federal legislation. The agency must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide, *see* Natural Resources Defense Council, Inc. v. Morton, *supra*. Nevertheless, compliance with the NEPA command that an agency "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources," 42 U.S.C. § 4332(2)(D), must be judged against a rule of reason. "There is no need for an [impact statement] to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative." Life of the Land v. Brinegar, *supra*, 485 F.2d at 472.

[19, 20] In this light the statement cannot be condemned for its failure to discuss either the acquisition of the recharge zone as a park at a prohibitive cost, or the elimination of all federal assistance to any development over the recharge zone. Furthermore, HUD's Title VII responsibility is limited to

approving or disapproving, in accordance with the statute's provisions, new community applications. Although the Act permits HUD upon specific authorization of the President "to plan and carry out large-scale projects" on federally owned lands to demonstrate the development of and serve as models for new communities, 42 U.S.C. § 4524, this statutory authority does not obligate the agency to search out a competing applicant willing to develop and finance a project on an alternate site or to work up a counter-proposal of its own before it can pass on the merits of a properly submitted new community application. "There can be no merit to plaintiff's claim that HUD cannot approve an otherwise eligible project merely because they have discovered vacant land in an area that they believe may be better suited for a new community than the existing site." Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839.

[21] None of the alternative sites in Bexar County suggested by the plaintiff met all the eligibility requirements of Title VII. Absent a competing applicant, HUD's prerogatives ultimately consisted of accepting or rejecting the application before it. The impact statement explored the consequences of both courses of action. If HUD is to discharge fully its Title VII and NEPA duties, it must also review the available alternatives in planning, design and placement of a new community. The impact statement adequately discussed these aspects of the Ranch. When the statement is read with its supporting documentation, it furnishes sufficient information "to permit a reasoned choice of alternatives so far as environmental aspects are concerned." Natural Resources Defense Council, Inc. v. Morton, *supra*, 458 F.2d at 836. Since the statement was not deficient in approach and reflected a basis in good faith objectivity, we hold that it fully complied with NEPA.

[22] Finally, plaintiffs assert that the Secretary's substantive decision to approve federal assistance to the developers of

the Ranch gave insufficient weight to the environmental risks inherent in constructing a city of 88,000 persons over an area supplying water to more than 1,000,000 residents. The environmental studies indicated that domestic sewage, solid waste, accidental spills of dangerous liquids and storm water run-off posed the greatest threats to the integrity of the aquifer. The district court summarized well the pervasive measures required by HUD to protect the water quality of the underground reservoir. It suffices to refer the interested reader to that cogent exposition with the observation that the precautions taken clearly supported the court's determination of their adequacy. Sierra Club v. Lynn, *supra*, 364 F.Supp. at 843.

Should it be discovered that pollutants have escaped the surface controls and threaten the aquifer, the developer must take remedial action, including installing an impervious lining in drainage channels over the 161 acres of land identified as especially porous. Any remedial action is subject to HUD and Texas Water Quality Board approval. The project agreement makes it the developer's legally enforceable duty to comply with all present and future environmental quality standards. The developer has agreed to undertake measures to minimize soil erosion and control of sediment and water run-off during the construction phases. To effectuate its duty of quality control and inspection of public improvement construction projects, the developer in conjunction with the City of San Antonio, the Texas Water Quality Board and the Texas State Department of Health has agreed to create an environmental committee, an architectural review board and to employ an independent inspection agent, whose reports will be available to all public and other regulatory agencies. We view the efforts expended to protect the aquifer as substantial and apparently efficacious. The Secretary's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

III.

Water Pollution Prevention and Control Act Amendments of 1972

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92-500, 86 Stat. 816, 33 U.S.C. § 1251 et seq., in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To this end the administrator of the Environmental Protection Agency is directed, in cooperation with other federal, state and local agencies, to "prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve . . . the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes." 33 U.S.C. § 1252(a). The Act provides for federal and state enforcement of effluent limitations to be prescribed and of a discharge permit system. 32 U.S.C. § 1319. Unless in compliance with the provisions of the Act, "the discharge of any pollutants by any person shall be unlawful." 33 U.S.C. § 1311.

The district court concluded that plaintiffs had failed to state a claim under the Water Pollution Control Act because (1) this record does not reflect that the Environmental Protection Agency had established any water quality standards for the court to enforce, and (2) the scheme of environmental controls imposed should prevent any Ranch polluted water from reaching the aquifer. In this court, arguing from the dual premises that the Act establishes a federal policy of nondegradation of the Nation's surface and ground water supplies and that either the Ranch or the "parasite" developments it will attract in adjacent areas will inevitably result in the degradation of the aquifer, plaintiffs contend that HUD's loan commitment violates the duty imposed on the agency by

33 U.S.C. § 1368(c). This section provides in pertinent part that "[i]n order to implement the purposes and policies of this chapter to protect and enhance the quality of the Nation's water, the President shall . . . cause to be issued an order (1) requiring each Federal agency authorized to enter into contracts and each Federal agency which is empowered to extend Federal assistance by way of grant, loan, or contract to effectuate the purpose and policy of this chapter in such contracting or assistance activities. . . ." In Executive Order No. 11738, 38 Fed.Reg. 161 (1973), the President subsequently mandated that "each Federal agency empowered to extend Federal assistance by way of grant, loan or contract shall undertake such procurement and assistance activities in a manner that will result in effective enforcement of the Clean Air Act and the Federal Water Pollution Control Act. . . ."

[23] In the absence of evidence that the Ranch will pollute the aquifer and degrade established standards of water quality or that HUD's loan commitment contravened its duty to effectuate the Federal Water Pollution Control Act, we affirm the district court's determination that plaintiffs have failed to state a claim for violation of that Act. As the court below stated, the record is silent as to standards of water quality for the aquifer prescribed by the Environmental Protection Agency. It is undisputed that the developer must meet any state or federal water standards that may be established in the future. More importantly, the developer must act to prevent the Ranch from degrading the existing water quality in the aquifer. If the Ranch is discovered to be polluting the underground water supply, the developer has the legally enforceable duty to remedy the situation.

IV.

Attorneys' Fees

Convinced that this litigation, instituted by the plaintiffs as "private attorney generals," had advanced the public interest

by ensuring that adequate precautions would be taken to protect the aquifer and by effectuating important congressional policy, the district court awarded plaintiffs 20,000 dollars in attorneys' fees, costs and expenses. Only the developers were cast in judgment for this award since HUD and Secretary Lynn were immunized by statute. *See* 28 U.S.C. § 2412. Plaintiffs appeal from the award as inadequate. The developer cross-appeals from the award as improperly assessed against it. We reverse on the cross-appeal.

"The so-called 'American Rule' governing the award of attorneys' fees in the federal courts is that 'attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.' Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967)." F. D. Rich Co., Inc. v. United States, Industrial Lumber Co., Inc., — U.S. —, —, 94 S.Ct. 2157, 2163, 40 L.Ed.2d 703 (1974). Plaintiffs recognize that neither NEPA nor Title VII provide for the recovery of attorneys' fees. They had no contractual agreement with HUD or the developer concerning attorneys' fees.

> The "American Rule" has not served, however, as an absolute bar to the shifting of attorneys' fees even in the absence of statute or contract. The federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation. We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefitted class. The lower courts have also applied a rationale for fee shifting based on the premise that the expense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important public policies.

F. D. Rich Co., Inc. v. United States, Industrial Lumber Co., Inc., *supra*, —— U.S. at ——, 94 S.Ct. at 2165 (footnotes omitted).

The power to award attorneys' fees in the absence of statutory or contractual authorization is rooted in the inherent power of a federal court to do equity in the face of "overriding considerations." *See* Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). Clearly, no such considerations within the ambit of the first two exceptions to the American Rule exist in this case. It would be improper to punish the developer or HUD, either as unsuccessful litigants, or for bad faith, vexatious or obdurate conduct in their defense of the action. Inapplicable also is the "common fund" or "common benefit" exception, which is founded on the unjust enrichment rationale that the entire class benefited by a plaintiff's efforts should share the cost of litigation. It shifts to the beneficiaries those costs that they would have incurred had they brought and prosecuted the suit. *See* Hall v. Cole, *supra*; Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). None of the benefits of this litigation cited by the district court have inured, except in the abstract, to the developer. The common benefit rationale could justify an award against a public agency or private entity which would be able to shift the costs in common to the members of the public who draw their water from the Edwards Aquifer. Clearly, the developer is not in a position to distribute the costs of this litigation to the one million residents of the San Antonio area who will benefit from the preservation of this water source.

The present case is almost identical to The Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974), petition for cert. filed, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309 (1974). There the District of Columbia Circuit invoked the third exception to the American Rule to award attorneys' fees to plaintiff citizen groups who had acted as private attorney generals in litigation which, while not obtaining the ultimate

relief sought, did act as a catalyst to effect a change that served the public interest. The litigation had blocked construction of the Trans-Alaska Pipeline until Congress subsequently enacted specific legislation permitting construction. One-half of the plaintiffs' attorneys' fees were assessed against Alyeska Pipeline Service Co., the private applicant under the Mineral Leasing Act, despite the fact that it was the Interior Department which had violated the Act and failed to comply with NEPA. The court reasoned that since "Alyeska unquestionably was a major and real party at interest in this case, actively participating in the litigation along with the Government, we think it fair that it should bear part of the attorneys' fees." 495 F.2d at 1036 (citation omitted). The fees were arbitrarily halved and Alyeska was assessed one half. Since collection from the government was barred by statute, plaintiffs were required to absorb the other half. While Alyeska's participation in litigation that would have been finally adjudged improper but for congressional intervention might be cited as a distinguishing feature, the basic thrust of the majority position in the D. C. Circuit supports the action taken by the court below.

[24] We decline to follow *The Wilderness Society*. This circuit has never assessed attorneys' fees against a party innocent of any wrongdoing.[6] In the absence of proof that the private party controlled the government agency's actions or caused its default, it cannot be cast in judgment as a result of the agency's shortcomings. The fact that the breach of duty involved was committed by one who is immune from liability for financial redress affords no basis for a shifting of fees.

[25] It would be inequitable to assess attorneys' fees against the private developer in this case. Granting that plaintiffs performed a valuable public service in bringing this

6. Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); 493 F.2d 765 (5th Cir. 1974) and Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970), relied upon by the district court, are not to the contrary.

action which directly caused HUD's full compliance with NEPA on the Ranch project, it cannot be gainsaid that HUD was the only party that had breached a duty.[7] Congress directed the environmental obligations of NEPA against federal agencies alone. HUD was solely responsible for the initially deficient impact statement. The developer successfully defended this lawsuit. Its defense was not shown to have been unreasonable or to have unduly protracted this litigation. The district court was incorrect in proceeding from the premise that "attorneys' fees should be awarded unless the trial court can articulate specific reasons for a denial." 364 F.Supp. at 848.

The result of governmental immunity in this case is to require plaintiffs to absorb their own legal expenses. Another solution for future cases must come from Congress rather than in whole or half from the pocket of an innocent party.

V.

Retention of Jurisdiction

In entering judgment for the defendants, the district court retained jurisdiction over this action for the purpose of ensuring future compliance with the safeguards imposed on the Ranch's development; monitoring the development of areas adjacent to the Ranch and new measures which may be taken to protect the recharge zone; and acting as a central depository and public information source for all future written materials relating to compliance with HUD's requirements. The Texas Water Quality Board and the Edwards Underground Water District were ordered to file semi-annual reports on the extent and effect of development over the recharge zone and the measures instituted for protection of the aquifer, as well as the status of legislation, proposals and plans to protect remaining portions of the recharge zone outside Bexar County. 364 F.Supp. at 846. We find no constitutional basis to support this continued exercise of federal judicial power.

7. Because plaintiffs were unsuccessful in their other claims of statutory violations, only NEPA compliance is pertinent.

[26] Federal courts are empowered under Article III of the Constitution to rule only upon an actual "case or controversy." *See, e. g.*, Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937). With the rendition of a definitive judgment for defendants on the merits of each of plaintiffs' claims, affirmed by this court, the litigable aspects of the dispute are at an end unless further appellate proceedings are undertaken. The issues capable of judicial determination have been resolved; the rights and duties of the parties have been adjudicated.

[27, 28] The district court must abjure the role of a quasi-administrative agency for environmental affairs in Bexar and other affected counties. No evidence whatsoever indicates that HUD will fail to discharge faithfully its statutory functions. *See* SEC v. Medical Committee for Human Rights, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972). No analogy properly can be drawn here to civil rights or school cases in which the litigation proceeded against a background of a long history of purposefully unlawful conduct. *See, e. g.*, Alexander v. Holmes County Board of Education, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969). If any defendant should be asserted to be acting in breach of its duties under HUD's commitment or the law, the present plaintiffs or others who may be affected are free to file another action based upon such asserted malfeasance. Of course, the judgment and grant of relief disposing of the litigation, could have compelled the parties to file in a convenient local public office such reports as they may in the future make that contain material of public interest. The court may so modify its judgment upon remand.

[29] However, although "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case . . .," United States v. Concentrated Export Assn., Inc., 393 U.S.

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199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968), federal jurisdiction must be founded upon at least a "mere possibility [of recurrence] which serves to keep the case alive." United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). The record here discloses only the most speculative of possibilities that plaintiffs will find it necessary in the future to invoke judicial guidance of HUD's activities. As of today they can demonstrate no legal injury sufficient to present an actual case or controversy. *See* Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). There no longer remains any unadjudicated claim upon which relief can be granted. *See* Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973). "A hypothetical threat, based on speculative facts, is not enough to support the jurisdiction of a Federal Court." Alabama ex rel. Baxley v. Woody, 473 F.2d 10, 14 (5th Cir. 1973). In sum, we find on this record no jurisdiction to retain jurisdiction.

VI.

Conclusion

The judgment appealed from is affirmed except as to the award of attorneys' fees and the retention of jurisdiction. The cause is remanded for the entry of an order not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

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IN THE

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OCTOBER TERM, 1974

No. 73-1977

ALYESKA PIPELINE SERVICE COMPANY,
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THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 495 F.2d 1026 (1974). There is no opinion of the district court, as the attorneys' fees questions here presented were addressed to the court of appeals in the first instance.

An earlier opinion of the court of appeals (addressed to the merits of the case) is reported at 479 F.2d 842 (1973). This Court denied petitions for a

writ of certiorari to review that decision. 411 U.S. 917 (1973).

JURISDICTION

The judgment of the court of appeals was filed on April 4, 1974. The petition for a writ of certiorari was filed on July 3, 1974, and certiorari was granted on October 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an attorneys' fee award can properly be made against a party which was not obdurate, cannot spread the costs to the beneficiaries of the litigation, and had no responsibility for enforcing the statutory provisions which were the basis of the litigation.

2. Whether attorneys' fees can be awarded under the "private attorney general" exception to the American rule barring recovery of attorneys' fees, in circumstances where (a) the statute on which the action is based does not reflect a strong congressional policy, (b) the award covers issues on which the attorneys do not prevail, and (c) there is no necessity for a fee award.

STATUTES INVOLVED

The decision of the court of appeals with respect to attorneys' fees was purportedly based on the equitable power of the courts and, accordingly, no statute is directly relevant. The provisions of the Mineral Leasing Act of 1920 and the National Environmental Policy Act of 1969 which were relevant to the decision on the merits are reprinted on pages 1a-3a, *infra*.

STATEMENT OF FACTS

In June of 1969 an application was filed with the Department of the Interior for the necessary authority to construct an oil pipeline across federal lands on a route between Prudhoe Bay on the northern coast of Alaska and Valdez on its southern coast. As modified by amended application in December 1969 the authority requested included a 54-foot permanent right-of-way, together with special permits for temporary use of additional land adjacent to the right-of-way. Also in 1969 the Department of the Interior initiated a detailed study of environmental consequences of the proposal (*see* pp. 38-39, *infra*).

On March 26, 1970 respondents, The Wilderness Society, Friends of the Earth and Environmental Defense Fund, Inc., filed an action in the United States District Court for the District of Columbia to prevent the Secretary of the Interior from issuing the requested authorizations. (R. 1A.)[1] The complaint named only the Secretary as a defendant. Petitioner Alyeska Pipeline Service Company ("Alyeska") and the State of Alaska sought and obtained leave to participate as intervenor-defendants approximately 18 months later. (R. 83, 84.)

Respondents' complaint stated two distinct claims: (1) that the Secretary lacked the power to grant a 54-foot permanent right-of-way together with special permits for the temporary use of adjacent public land because the total requested authority exceeded the 54-foot limitation on width of rights-of-way contained

[1] Citations to the record in The Wilderness Society v. Morton, C.A. No. 928-70 (D.D.C.), are denoted "R. —". Citations to the record in The Cordova District Fisheries Union v. Morton, C.A. 861-71 (D.D.C.) are denoted "C.R. —".

in Section 28 of the Mineral Leasing Act of 1920 (41 Stat. 449; 30 U.S.C. § 185 [1970]); and (2) that the Secretary had not yet completed the environmental study initiated the previous year and thus had not at that time satisfied the requirements of the recently-enacted National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. § 4321 *et seq.*) (hereinafter "NEPA").

On April 23, 1970, the district court entered a preliminary injunction against the Secretary. (R. 26.) This injunction remained in effect for over two years while the Department of the Interior completed its exhaustive analysis of the environmental impact of the proposed pipeline. Steps taken by the Department are more fully described in the briefs in the court below and are summarized on pp. 38-39, *infra*. Both Alyeska and the respondents submitted information to the Department (as did many other public and private organizations) which was considered during the course of its evaluation. Respondents' principal position was that the Department should reject the trans-Alaska route proposed by Alyeska and adopt an alternative pipeline route across Canada which respondents believed to be preferable for environmental reasons.

The Department's environmental analysis culminated in the publication of a six-volume environmental impact statement (R. 239), accompanied by a three-volume analysis of economic and national security impacts (R. 239), and in an announcement by the Secretary of the Interior on May 11, 1972, that he had decided to issue the authority necessary for construction of the pipeline along the route proposed by Alyeska (A. 105).

Proceedings in the district court, which had been essentially dormant, were then reactivated.[2] On May 12, 1972 respondents moved for partial summary judgment on the Mineral Leasing Act issues. (A. 139.) On motion of the defendants (A. 140, 153), the district court deferred consideration of the summary judgment motion on the ground that all of the issues should be considered together. (R. 184.) On the NEPA issues, respondents argued primarily that the Secretary failed to give adequate consideration to the alternative pipeline route across Canada. Following briefing and a plenary hearing, on August 16, 1972 the district judge vacated the preliminary injunction which he had issued in April 1970, ruled in favor of defendants on all issues, and dismissed the complaint.

An expedited appeal to the Court of Appeals for the District of Columbia Circuit ensued. That court, sitting *en banc*, ruled that Section 28 of the Mineral Leasing Act barred the Secretary from issuing to Alyeska the special land use permit for temporary use, incident to construction, of lands adjoining the 54-foot permanent right-of-way for the pipeline. 479 F.2d 842 (1973). By a vote of 4 to 3, the court declined to decide respondents' claim that the Secretary had not complied with NEPA. *Id.* at 889. The three dissenting judges considered the NEPA issues and concluded that all NEPA requirements had been met. It was also their view that the court of appeals had an obli-

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[2] On April 28, 1971 a second complaint had been filed: The Cordova District Fisheries Union v. Morton, C.A. No. 861-71 (D.D.C.) (C.R. 3). This action was consolidated with Wilderness Society v. Morton by order of the district court (May 11, 1972) (C.R. 60) and was decided at the same time. A request for attorneys' fees was also filed in the *Cordova* case, but was denied by the court of appeals and is not before this Court.

gation to decide the NEPA issues. *Id.* at 905, 912. This Court denied certiorari. 411 U.S. 917 (1973).

Almost immediately after this Court's action, Congress took steps to nullify the results of the court of appeals' decision. On November 16, 1973 amendments to the Mineral Leasing Act were enacted which gave the Secretary express authority to issue all of the permits in question. The Act also *directed* the Secretary to issue the permits and take all other steps necessary for construction of the pipeline; and it specifically provided that no further action under NEPA would be required. Finally, Congress included a provision prohibiting (except for Constitutional questions) further judicial review of government actions in connection with the pipeline. P.L. 93-153, 87 Stat. 577 *et seq.* (November 16, 1973).[3]

While Congress was considering legislation to eliminate the impasse created by the court of appeals' decision, respondents filed a bill of costs with the court of appeals. Respondents alleged that it was appropriate to file their bill of costs in the court of appeals because the district court had "acted merely as a conduit. . . ." Respondents requested an award of expenses and compensation for 4455 hours of attorney time in connection with both the court proceedings and respondents' submission to the Department of Interior of comments on the impact statement. Attorneys' fees were sought only as to Alyeska, although the more customary "costs" were sought from the United States and from the State of Alaska.

[3] The validity of the prohibition on judicial review was before this Court on direct appeal in Bud Brown Enterprises, Inc. v. Morton, *motion to affirm granted*, 43 U.S.L.W. 3206 (Oct. 9, 1974).

Following briefs and oral argument, the court of appeals, again sitting *en banc*, decided by a vote of 4 to 3 that an award of attorneys' fees against Alyeska alone was appropriate and remanded the case to the district court to determine the amount of the attorneys' fees. 495 F.2d 1026 (1974).

The majority recognized that there is a general rule against awarding attorneys' fees and that neither of the exceptions which have been approved by this Court would justify an attorneys' fees award. *Id.* at 1029. However, the majority found that respondents had acted in the public interest by prosecuting the suit and that, as a result, it was appropriate to award fees based on a "private attorney general" rationale. *Id.* at 1035-36. The majority expressly stated that it was breaking new ground, ruling "for the first time today" that a fee award "was proper on behalf of 'private attorney general' litigants in environmental suits successfully prosecuted in the public interest." *Id.* at 1038 n. 9. The court counted it "a happy result of our decision" that the decision "may increase the willingness of skilled lawyers throughout the nation to undertake public interest litigation on behalf of unmonied clients with just, lawful, and important claims." *Id.*

In finding that an award was proper under the private attorney general exception, the court abandoned the requirement imposed in previous cases utilizing the exception that the statutory duty involved must reflect a strong congressional policy. The majority also extended the award of attorneys' fees to work on all issues in the case (including work related to the administrative process), even though respondents failed to prevail on the NEPA issues. *Id.* at 1034. And the majority ruled that respondents' at-

torneys could be awarded the "reasonable value" of services rendered, even though such "value" might substantially exceed the amounts paid by the respondents to their attorneys. *Id.* at 1036.

As to allocation among the defendants, the court of appeals decided that it would be "inappropriate" to tax attorneys' fees against the State of Alaska (*id.* at 1036 n.8),[4] but appropriate to assess attorneys' fees equally against the United States and the private party intervenor, Alyeska. *Id.* at 1036. However, recovery against the United States was barred by 28 U.S.C. § 2412, so the burden of paying attorneys' fees fell solely upon the private party intervenor, to the extent of 50 percent of the award.

Three dissenting judges strongly disagreed. They said: that passage by Congress of the "Trans-Alaska Pipeline Authorization Act" (P.L. 93-153) made it clear respondents were acting *against* the public interest, not in furtherance of it (495 F.2d at 1042); and that the majority decision, which permits recovery for issues upon which respondents did not prevail and which permits recovery in excess of the amounts actually paid or owed to counsel, is a "dangerous precedent" which may "be just the stimulus needed to launch . . . in the direction of the courthouse" other potential plaintiffs who have differing views as to where the "public interest" lies, thereby giving "new impetus" to the "flood of 'public interest' litigation, particularly in the environmental field. . . ." *Id.* at 1043. In addition, one judge pointed out that

[4] The majority based this conclusion on the fact that Alaska also presented "public interest implications" of the pipeline. The majority, however, concluded that *expenses* "should be divided equally among Alyeska, the State of Alaska, and the United States." *Id.* at 1028.

Alyeska should not "be held answerable for what the majority apparently perceives to be the sins of the Government" and that the real premise of the opinion is: "oil companies are prosperous, appellants are poor, and therefore oil companies should finance both sides of this litigation." *Id.* at 1042.

This Court granted Alyeska's petition for a writ of certiorari on October 15, 1974.

SUMMARY OF ARGUMENT

Whether or not this Court approves of the "private attorney general" exception to the traditional American doctrine barring award of attorneys' fees, consideration of that doctrine is unnecessary to dispose of this case, because Alyeska is not an appropriate party against whom an award can be made. It is conceded by the court of appeals that neither of the two nonstatutory exceptions to the nonaward doctrine —the "obdurate behavior" and the "common fund or common benefit" exceptions—justifies an award against Alyeska.

In this litigation, respondents sought to enforce certain statutes bearing on the duties of the Secretary of the Interior. As the court of appeals recognized in its earlier opinion on the merits, neither of these statutes imposed any responsibilities on Alyeska. Under these circumstances, it is inequitable to impose attorneys' fees on Alyeska. Award of attorneys' fees against a party is not proper merely because the party participated in the litigation, but must be based upon responsibility for noncompliance with statutory duties imposed upon the party. Alyeska clearly had no such responsibility, and could control neither the Secretary's interpretation of the Mineral Leasing Act

width provision nor the adequacy of the Department's compliance with NEPA. As the Fifth Circuit has recently concluded, private parties should not be made to pay for actions of federal officials which they have neither controlled nor improperly influenced. Because Congress has by statute precluded an award against the federal officials whose duty was in issue does not justify violating this principle. In such cases, provisions for award of attorneys' fees must come, if at all, from Congress.

As to the application of a "private attorney general" exception, no such nonstatutory exception has ever been embraced by this Court. But even if such an exception were to be adopted, no basis for an award would exist here because the requirements of such an exception are not met.

The first requirement for application of a private attorney general exception is that the statute involved in the litigation reflect a policy considered by Congress to be of the highest priority. That requirement cannot be met here because the Mineral Leasing Act width provision, as to which respondents prevailed in part, did not reflect such a congressional priority. The prompt amendment by Congress of the provision in question demonstrates the lack of congressional commitment to the previous provision. Furthermore, the fact that the width limitation in question was never mentioned in congressional committee reports leading to the enactment of the limitation plainly demonstrates that the enacting congress did not view it as a matter of special priority.

In abandoning the congressional priority requirement, the court of appeals created an exception to the nonaward rule which either (1) justifies awards for

all federal statutes governing the duties of federal officials, or (2) requires a judicial selection, for which no ascertainable standards exist, of qualifying statutes. The former invites wholesale applications for attorneys' fees and provides a further stimulus to litigation in the federal courts; the latter would provoke endless litigation over the scope of the exception, while at the same time involving the courts in a form of legislative judgment unsuited for judicial determination.

The second requirement of the private attorney general doctrine is that awards go only to successful litigants. Respondents plainly did not prevail on any NEPA issues. These issues were left undecided by the court of appeals, and the three judges who expressed a view on them would have ruled against respondents. Success is the only objective indication that a statutory policy has been vindicated. To abandon the success requirement will involve the courts in speculation as to whether beneficial results might have occurred without the unsuccessful suit, or whether the goals pursued in litigation would be beneficial.

Judicial assessments of public benefit are no adequate substitute for objective success. The difficulties of such assessments are reflected by the strongly conflicting views of the closely-divided court of appeals concerning the nature of respondents' contributions. And Congress' prompt legislative mandate to proceed with the pipeline shows an assessment at odds with that of the majority of the court of appeals.

Even if the unsuccessful respondents could qualify for an award by demonstrating a public benefit, the existence of a benefit attributable to them cannot be assumed, as the court of appeals did, but requires

supplementary proceedings. The substantial environmental efforts by the Secretary before NEPA was enacted, and the evidence that post-NEPA efforts were stimulated by genuine environmental concern as well as by many judicial interpretations of NEPA in other cases, undermine respondents' claim of credit for any beneficial results of Interior's efforts.

The third requirement of the private attorney general doctrine is that of necessity. It is not met here because respondent organizations are financially supported by their substantial membership for the purpose of bringing environmental suits. Such organizations themselves thus provide a means of allocating the cost of environmental suits broadly among those who perceive such litigation to be beneficial. The vast number of environmental suits since 1969, including a number in which respondent organizations participated, demonstrates that no further incentive to the proliferation of such suits is required.

ARGUMENT

I. ALYESKA IS NOT AN APPROPRIATE PARTY AGAINST WHICH AN AWARD OF ATTORNEYS' FEES CAN BE MADE

A. Neither Of The Exceptions To The Rule Barring Recovery Of Attorneys' Fees Which Have Been Recognized By This Court Justifies An Award Against Alyeska

This Court has consistently followed, and has recently reaffirmed, the traditional American rule that attorneys' fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *F. D. Rich Co.* v. *United States*, 94 S. Ct. 2157, 2163 (1974).[5] The rule reflects a sound judicial

[5] *See also* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1963); Forest Laboratories, Inc. v. Pillsbury Co., 452 F.2d 621, 638 (7th Cir. 1971); Hohensee v. Basalyga, 50 F.R.D. 230, 232 (M.D. Pa. 1969), *aff'd*, 429 F.2d 982 (3rd Cir. 1970); Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemical Corp., 407 F.2d 288, 293 (9th Cir. 1969); Fleischer v. Paramount Pictures Corp., 329 F.2d 424, 426 (2d Cir.), *cert denied*, 379 U.S. 835 (1964).

aversion to penalizing good faith litigation. It recognizes that courts would be making judgments which are inherently legislative in nature if they award attorneys' fees to promote the congressional purpose underlying a specific statute when Congress has not provided for such award.[6]

Two carefully circumscribed exceptions to the doctrine have been recognized by this Court; both are designed to achieve particular equitable objectives. *F. D. Rich Co., supra* at 2165. The first exception relates to obdurate behavior by a party to litigation. It authorizes an award under the court's "equitable powers to impose costs on defendants who behaved in bad faith" (*La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 96 (N.D. Cal. 1972)), and is applied to oppressive or vexatious conduct by a litigant. *See, e.g., Vaughan* v. *Atkinson*, 369 U.S. 527 (1962).

In this case the court of appeals expressly recognized that there was no conduct by any of the de-

[6] Where Congress has desired to provide for fee awards, it has carved out specific statutory exceptions to the general American rule. *See, e.g.*, Clayton Act, 15 U.S.C. § 15 (1970) Communications Act of 1934, 47 U.S.C. § 206 (1970); Packers and Stockyards Act, 7 U.S.C. § 210(f) (1970); Perishable Agriculturable Commodities Act, 7 U.S.C. § 499g(b) (1970); Railway Labor Act, 45 U.S.C. § 153(p) (1970); Interstate Commerce Act, 49 U.S.C. § 16(2) (1970). Often these statutory exceptions are explicitly limited to instances where bad faith or wrongful intent justify a fee award. *See* Securities Act of 1933, 15 U.S.C. § 77k(e) (1970); Servicemen's Readjustment Act, 38 U.S.C. § 1822(b) (1970); Trust Indenture Act, 15 U.S.C. § 77www(a) (1970).

fendants which would invoke the obdurate behavior exception:

> Appellees' legal position as to the meaning of the Mineral Leasing Act and relevant administrative regulations, though ultimately rejected by the court, was manifestly reasonable and assumed in good faith, particularly in view of the long administrative practice supporting it. [495 F.2d at 1029.]

The second exception is known as the "common benefit" exception. It was initially developed to prevent unjust enrichment where the attorneys' efforts for which a fee award is claimed have produced a "common fund" of benefit to a class, and an award of fees operates to shift the burden of litigation equitably to all the beneficiaries of the fund. *See, e.g., Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). Subsequently, the exception was expanded to cover situations in which no actual fund was produced, but the "successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost [of litigation] proportionately among members of the benefitted class." *F. D. Rich Co., supra* at 2165. "It shifts to the beneficiaries those costs that they would have incurred had they brought and prosecuted the suit." *Sierra Club* v. *Lynn*, — F.2d — (5th Cir., Oct. 4, 1974) (opinion reprinted *infra* at 4a). This broader conception of the common benefit doctrine applies, for example, where the imposition of fees upon a corporation in a shareholders' derivative action, or upon a union in a suit to enforce union membership rights, provides a natural and efficient mechanism for

imposing upon all of the shareholders or union members the costs of an action which benefits them all.[7]

In the present litigation, if a benefit had been produced, an award against the United States (had it not been barred by 28 U.S.C. § 2412)[8] would have operated to spread the benefit among all citizens. Similarly, an award against the State of Alaska would have spread the claimed benefits at least among the residents of a state which expects to receive special economic benefit from the pipeline.[9]

But the "common benefit" exception has no application to Alyeska. As the court of appeals noted, the beneficiaries of the litigation (assuming that such benefit exists) are citizens at large, and "imposing attorney's fees on Alyeska will not operate to spread the cost of the litigation proportionately among the beneficiaries, the key requirement of the common benefit theory." *Id.* at 1024. Inapplicability of the common benefit exception in similar circumstances

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[7] *See* Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Yablonski v. United Mine Workers of America, 466 F.2d 424 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 918 (1973); and Bakery & Confectionery Workers Int'l Union v. Ratner, 335 F.2d 691 (D.C. Cir. 1964).

[8] "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action." 28 U.S.C. § 2412.

[9] Respondents sought no award against the State, and the court of appeals blandly asserted that such an award would "undermine rather than further the goal of ensuring adequate spokesmen for public interests." 495 F.2d at 1036 n.8.

was recently recognized by the Fifth Circuit in *Sierra Club* v. *Lynn* (*see infra* at 45a).[10]

B. The Legal Duty Which Respondents Sought To Enforce Was That Of The Interior Department

This lawsuit was based on two statutory provisions: Section 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185, which governed the width of rights-of-way for oil pipelines across federal lands managed by the Department of the Interior, and the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*, which states the obligations of federal agencies with respect to the consideration of environmental values and the preparation of environmental impact statements prior to taking "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332.

Each of these provisions imposes limitations on the authority of, or imposes a duty upon, federal officials and agencies. Neither imposes any duty of compliance on a private party seeking favorable agency action.

With respect to the Mineral Leasing Act, authority to grant the requested permanent right-of-way and temporary use of land contiguous to the right-of-way depended upon interpretation by the Department of the Interior of laws entrusted to its administration.[11]

[10] *See also* Harrisburg Coalition Against Ruining the Environment, No. 71-143 Civil (M.D. Pa., July 12, 1974).

[11] For many years, the Department of the Interior had regulations permitting the use of so-called "special land use permits", a form of revocable license to use federal lands, for various purposes not specificaly authorized by statute. *See, e.g.*, 43 C.F.R. Part 2920 (1970). Such revocable permits had on occasion, prior to the application relating to the Alaska pipeline, been utilized to provide additional space for construction purposes in connection with grants of pipeline rights-of-way across public lands pursuant to 30 U.S.C. § 185 (cited on pp. 40-44 of Alyeska's brief on Mineral Leasing Act issues in the courts below, A. 166-170). Similar uses of federal lands had been recognized by a line of opinions of the Attorney General. *E.g.*, 35 Op. Att'y Gen. 485 (1928); 30 Op. Att'y Gen. 470 (1915); 22 Op. Att'y Gen. 240, 303, 544 (1898); 19 Op. Atty's Gen. 628 (1890); 16 Op. Att'y Gen. 152, 206 (1878).

Thus Alyeska could obtain the permits it sought only upon favorable action on its requests by appropriate Interior officials.

With respect to the National Environmental Policy Act, that statute imposes a duty upon all federal officials to consider fully the environmental impact of any proposed major federal action. 42 U.S.C. § 4332 (2)(C). Decisions of the lower federal courts describe in detail the nature and scope of this obligation upon federal officials.[12] It has been firmly established that the duty of such officials under the Act is not delegable to an applicant, but must be performed by the federal officials. *See Greene County Planning Board* v. *FPC*, 455 F.2d 412, 420 (2d Cir.) *cert. denied*, 409 U.S. 849 (1972). The essentially governmental nature of this responsibility, and the discharge of that responsibility by the Secretary of the Interior, are clearly demonstrated by the facts in this case, which evidence an unprecedented and continuing effort by the Department (both before and after the passage of NEPA) to consider fully all environmental implications of the proposal.[13]

The fact that the legal authority and duties which are involved in this case were vested exclusively in

[12] *See, e.g.*, Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972).

[13] This history is described on pp. 6-37 of Alyeska's brief on NEPA issues in the court below (A. 178-209).

the Department of the Interior was recognized in both opinions of the court of appeals. In its decision on the merits, the court stated:

> Appellants contend that *issuance* of certain rights-of-way and special land use permits *by the Secretary of Interior* to Alyeska and to the State of Alaska would violate Section 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1970), by exceeding the width limitation of that section. They argue, too, that the permit issued by the *Forest Supervisor* violates 16 U.S.C. §§ 497 and 497a (1970) by exceeding the 80 acre limitation of those sections. Finally, appellants contend that issuance of any permits or rights-of-way necessary for construction of the trans Alaska pipeline violates the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, et seq. (1970) (hereinafter NEPA). In general they claim that *Interior has not prepared an adequate environmental impact statement.* [479 F.2d at 846 (emphasis added.]

Similarly, in its decision regarding the award of attorneys' fees, the majority of the court of appeals found that "it is the Interior Department [action], on Alyeska's application, which violated the Mineral Leasing Act by granting rights-of-way in excess of the Act's width restrictions, and it is the Interior Department's failure to comply with NEPA which was challenged on appeal." 495 F.2d at 1036.

C. The Burden Of A Fee Award May Not Be Shifted To A Private Party Which Violated No Law And Had No Legal Duty

As explained above, it appears to be beyond dispute that in this case Alyeska (1) was not guilty of any improper conduct, (2) is not in position to shift a fee award to the "beneficiaries," and (3) had no

responsibility under the statutes which respondents sought to enforce. In these circumstances, an award against Alyeska is highly inequitable. The only justification advanced by the court of appeals for this aspect of its decision is the following brief statement:

> Fee shifting under the private attorney general theory, however, is not intended to punish law violators, but rather to ensure that those who have acted to protect the public interest will not be forced to shoulder the entire cost of litigation. *Cf. Hall* v. *Cole, supra*, 412 U.S. at 14. After successfully persuading the Interior Department to grant the rights-of-way, Alyeska intervened in this litigation to protect its massive interests. Since Alyeska unquestionably was a major and real party at interest in this case, actively participating in the litigation along with the Government, we think it fair that it should bear part of the attorneys' fees. *Cf. Silva* v. *Romney*, 1 Cir., 473 F.2d 287 (1973). [495 F.2d at 1036.][14]

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[14] Recognizing that a fee award against Alyeska could not be based on any exception which has been approved by this Court, the court of appeals sought to justify its award under the "private attorney general" doctrine. The substantive requirements of that doctrine will be analyzed in the next section of this brief. However, consideration of the circumstances, if any, in which the application of such doctrine would be proper is not necessary to the decision in this case, since fees have been taxed here against an inappropriate party; we are not aware of any case (other than Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973)) in which the private attorney general doctrine has ever been used to permit awards against parties without responsibility with respect to the legal violation. Sierra Club v. Lynn was reversed by the Fifth Circuit on October 4, 1974. *See infra* at 21.

Neither of the cases cited by the court supports its proposition. In Hall v. Cole, the private attorney general claim was specifically reserved for future decision. 412 U.S. at 5 n. 7 (1973). The Court decided the case on a benefit rationale, holding that "reimbursement of respondent's attorneys' fees out of the union treasury simply shifts the costs of litigation to 'the class that has benefited

This explanation was sharply criticized by Judge MacKinnon:

> Brevity is not always to be desired—especially on the pivotal issue of whether Alyeska should be held answerable for what the majority apparently perceives to be the sins of the Government. Perhaps this brevity, so admirable in other contexts, is attributable to an inability to marshal cogent arguments to support the proposition advanced; more likely, however, such brevity is required to mask sub silentio the majority premise of the opinion. That is, oil companies are prosperous, appellants are poor, and therefore oil companies should finance both sides of this litigation. [495 F.2d at 1042.]

The majority's offhanded disposition of the key issue in the case misconceives the principle which is involved. It is not the fact of participation in litigation by one who has a financial stake in the outcome which should be the measure of an obligation to pay attorneys' fees. Rather, it is the question of who has the responsibility for the action which is at issue.

In this case, such responsibility is vested solely in a federal official. It was the Secretary of the Interior, and only the Secretary, whose actions, and whose statutory duty, were in question. Alyeska participated in the evaluation effort only to the extent of submitting information requested by the Department.

from them and that would have had to pay them had it brought the suit'." *Id.* at 8-9. In Silva v. Romney, 473 F.2d 287 (1 Cir. 1973), the court declared that a district court had the authority to enjoin private parties from proceeding with environmentally damaging actions pending completion of an impact statement by the government. The case did not concern the proposition that a private party can be held responsible for violations of law committed by the government.

Alyeska was not privy to the development of the final environmental statement and had no control over the scope or content of that statement, the choice of supporting data or the conclusions reached. Alyeska did not participate in the consultations between Secretary Morton and other federal officials which preceded his final decision.

As to the litigation, it must be pointed out that the complaint was filed solely against the Secretary of the Interior and, until Alyeska and the State of Alaska intervened 18 months later, he was the only defendant. After Alyeska and Alaska intervened, the Government continued to play its primary role in the litigation as counsel for the Secretary. There is no evidence whatsoever that Alyeska controlled the Government's actions and the court of appeals made no such finding.

Moreover, participation by other parties in litigation involving the acts of a government official cannot alter the nature of the governmental responsibility, or provide a basis for shifting to private parties the burden of compensating those claiming to be aggrieved by government action. Whatever the scope of justifiable awards under a private attorney general rationale, private parties should not be made to pay for actions of federal officials which they have neither controlled nor improperly influenced.

In its recent decision in *Sierra Club* v. *Lynn* (reprinted *infra* at 4a) the Court of Appeals for the Fifth Circuit flatly rejected the decision of the majority here and refused to follow it. The analysis of the Fifth Circuit is sound and should be approved by this Court. In that case, the district court had awarded attorneys' fees against a private defendant in an action challenging the adequacy of an environ-

mental impact statement prepared by the Department of Housing and Urban Development. The Fifth Circuit noted that the facts were "almost identical to The Wilderness Society v. Morton" where, as the court put it, "attorneys' fees were assessed against Alyeska Pipeline Service Company, the private applicant under the Mineral Leasing Act, despite the fact that it was the Interior Department which had violated the Act and failed to comply with NEPA." *Infra* at 45a-46a. The Fifth Circuit concluded that an award of attorneys' fees under such circumstances "would be inequitable," saying:

> We decline to follow the *Wilderness Society*. This Circuit has never assessed attorneys' fees against a party innocent of any wrongdoing. In the absence of proof that the private party controlled the government agency's action or caused its default, it cannot be cast in judgment as a result of the agency's shortcomings. [*Infra* at 46a.]

The same conclusion was reached by a district court which was asked to award attorneys' fees against a state when a federal agency had been charged with violating NEPA obligations. *Committee to Stop Route 7 v. Volpe*, 4 ERC 1681 (D. Conn. 1972). Noting that the default involved was that of a federal agency, the district court concluded that "it would not be appropriate to impose attorneys' fees as a cost upon the state, when the federal agency made the erroneous decision which led to the plaintiffs' judgment." *Id.* at 1682.[15]

[15] *See also* Harper v. Mayor and City Council, 359 F. Supp. 1187 (D. Md.), *modified*, 486 F.2d 1134 (4th Cir. 1973), where the court refused to award attorneys' fees against an intervenor who did not have the ability to influence the action in question.

In this case, the court of appeals imposed attorneys' fees against a non-responsible party where Congress had specifically precluded an award against the responsible party. If, as Congress directed, no fees are to be awarded under the statute against the responsible party, *a fortiori*, they are not to be awarded against a non-responsible party in the absence of a specific congressional direction. As the Fifth Circuit stated in the *Sierra Club* case:

> The fact that the breach of duty involved was committed by one who is immune from liability for financial redress affords no basis for shifting fees.
>
> . . . .
>
> The result of governmental immunity in this case is to require plaintiffs to absorb their own legal expenses. Another solution must come from Congress rather than in whole or half from the pocket of an innocent party. [*Infra* at 46a-47a.]

II. THE CIRCUMSTANCES OF THIS CASE CANNOT JUSTIFY AN AWARD OF ATTORNEYS' FEES UNDER A PRIVATE ATTORNEY GENERAL THEORY

A. The Private Attorney General Exception, Which Has Not Been Approved By This Court, Is Properly Applied Only In Certain Limited Circumstances

The "private attorney general" concept is generally traced to *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968). The case involved Title II of the Civil Rights Act of 1964 (*see* 42 U.S.C. § 2000a-3(b)), which expressly authorized awards of attorneys' fees, but left such awards to the discretion of the court. This Court held that attorneys' fees should ordinarily be recovered in successful actions brought under Title II. In so ruling, the Court observed that a successful plaintiff under Title II obtains an injunction "not for himself alone, but also as a private attorney

general, vindicating a policy that Congress considered of the highest priority." 390 U.S. at 402.

In some recent decisions, lower federal courts have extended the private attorney general rationale to grant fees without statutory authorization. Such decisions have been limited almost exclusively to civil rights and reapportionment cases—*i.e.*, lawsuits brought to protect fundamental rights expressed in the Constitution and in civil rights legislation.[16] Except for the district court decision in *Sierra Club* v. *Lynn*, which was reversed on appeal (*see infra* at 4a), they have involved situations where three elements emphasized in *Piggie Park* were all present: (1) "a policy Congress considered of the highest priority,"[17] (2) a successful party, and (3) a statutory scheme requiring private enforcement. 390 U.S. at 401-402. Further, as the Court of Appeals for the

[16] *See, e.g.*, Sims v. Amos, 340 F.Supp. 691 (M.D. Ala. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971). The cases are collected in Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. Pa. L. Rev. 636, 666-68 (1974). As the court stated in Wright v. Southeast Alabama Gas District, 376 F.Supp. 780, 783 (M.D. Ala. 1974): "While virtually every law establishing a remedy may be said to declare a public policy, the courts have confined their awards-of-fees-to-encourage-litigation policy to violations of civil rights acts . . . ." Prior to the instant case, the only extensions of the exception beyond civil rights and constitutional cases appear to be three district court decisions: Sierra Club v. Lynn, 364 F.Supp. 834 (W.D. Texas 1973) (NEPA), *rev'd*, — F.2d — (5th Cir. 1974) (*see infra* at 4a); Calnetics Corp v. Volkswagen of America, Inc., 353 F.Supp. 1219 (C.D. Cal. 1973) (antitrust); and La Raza Unida v. Volpe, 57 F.R.D. 94, 98 (N.D. Cal. 1972) (housing relocation).

[17] "It is particularly in the area of desegregation that this Court . . . recognized that, by their suit, plaintiffs vindicated a national policy of high priority." Bradley v. School Board of the City of Richmond, 94 S. Ct. 2006, 2020 n.27 (1974) (hereafter referred to as "Bradley v. School Board").

Fourth Circuit pointed out,[18] most decisions endorsing the private attorney general exception have first found that one of the recognized exceptions (obdurate behavior or common benefit) is applicable and then added the private attorney general rationale as an alternative ground. Indeed, the private attorney general rationale has generally been applied so as to constitute an expansion of the common benefit exception, with awards usually being made against a public body which has "the ability to spread or shift the attorneys' fees to those actually benefited or to the public at large." *Gilpin* v. *Kansas State High School Activities Ass'n, Inc.*, 377 F.Supp. 1233, 1250 (D. Kan. 1973).[19]

This Court has not yet had occasion to rule on such extension, though the issue has been raised in four cases previously before the Court.[20] As the Court recently stated:

> This "private attorney general" rationale has not been squarely before this Court . . . ; nor do we intend to imply any view either on the validity

[18] Bradley v. School Board, 472 F.2d 318, 331 n.56 (1972) *rev'd on other grounds*, 94 S. Ct. 2006 (1974).

[19] The *only* environmental cases involving the private attorney general theory have involved such cost spreading. *See* National Resources Defense Council v. EPA, 484 F.2d 1331, 1334 (1st Cir. 1973): "To allocate petitioners' reasonable costs and attorneys' fees to [the Environmental Protection Agency] is to spread them ultimately among the taxpaying public, which receives the benefits of this litigation." *See also* La Raza Unida v. Volpe, 57 F.R.D. 94, 101 (N.D. Cal. 1972); Harrisburg Coalition Against Ruining the Environment v. Volpe, No. 71-143 Civil (M.D. Pa., July 12, 1974).

[20] *See* Bradley v. School Board, *supra;* F. D. Rich Co. v. United States, *supra;* Hall v. Cole, 412 U.S. 1, 6 n.7 (1973); Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427, 429 n.2 (1973).

or scope of that doctrine. [*F. D. Rich Co.* v. *United States, supra,* 94 S. Ct. at 2165.]

Nonetheless, the court of appeals majority rested its award of fees solely upon its concept of a private attorney general exception, saying:

> Whether we consider the Mineral Leasing Act and administrative regulation issues upon which the court rested its opinion declaring the pipeline unlawful, or the National Environmental Policy Act (NEPA) issues which the court left undecided, appellants succeeded in their role as private attorneys general protecting vital statutory interests. [495 F.2d at 1032.]

The court recognized that it was breaking new ground:

> In July of 1971 [the date the suit was filed] no circuit had yet ruled that such an award was proper on behalf of "private attorney general" litigants in environmental suits successfully prosecuted in the public interest. Our circuit so rules for the first time today—in a 4 to 3 opinion. [*Id.* at 1038 n.9.]

As the preceding argument demonstrated, Alyeska is not a party against which fees can justifiably be awarded. However, wholly apart from the question of whether Alyeska was an appropriate party for the assessment of fees, we submit that no award against *any* party can be justified under the facts here, as this is not a proper case for application of the private attorney general exception. The court of appeals went substantially beyond prior decisions of other lower courts by ruling that the private attorney general doctrine could be invoked in circumstances where: (a) the statutory duty which plaintiffs seek to enforce does not reflect a strong congressional policy; (b) the award covers issues on which plaintiffs do not

prevail; and (c) the award is made even where there is no necessity for it.

B. The Mineral Leasing Act Was Not A Statute Reflecting A Strong Congressional Policy Justifying An Exception To The Nonaward Rule

As explained above, other decisions of lower courts applying a private attorney general exception have involved vindication of a policy which Congress considered " of the highest priority." Most have involved civil rights legislation [21] or constitutional issues. (*See* n. 16 *supra.*) Courts which have used the exception have also observed that federal courts have no license to award fees "as remedies to enforce all statutes." *Lee* v. *Southern Home Sites Corp.,* 444 F.2d 143, 145 (5th Cir. 1971); *La Raza Unida* v. *Volpe,* 57 F.R.D. 94, 99 (N.D. Cal. 1972).

In such cases as *Lee, supra, NAACP* v. *Allen,* 340 F. Supp. 703, 709 (M.D. Ala. 1972), and *Sims* v. *Amos,* 340 F. Supp. 691, 694 (M.D. Ala. 1972), fee awards were made only after a careful examination of the statute involved and a finding that such statute embodied a compelling or strong congressional policy. Similar analyses to find particular and unusual congressional interests have been made in many other cases.[22]

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[21] Commentators have defended the uniqueness of the civil rights laws compared to the thousands of competing statutory schemes and have noted that the private attorney general doctrine could be applied in civil rights cases without undermining the general nonaward doctrine. *See* Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation,* 33 Md. L. Rev. 329, 414 (1973).

[22] *See, e.g.,* Gilpin v. Kansas State High School Activities Ass'n, Inc., *supra,* 377 F.Supp. at 1250-51; Wallace v. House, 377 F.Supp. 1192, 1204-06 (W.D. La. 1974); Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974).

If this Court is to approve the private attorney general exception, it should limit such exception to cases in which it is found that plaintiffs have vindicated a clearly demonstrable "policy Congress considered of the highest priority . . . ." *Piggie Park, supra*, 390 U.S. at 402. If this requirement is not retained, then the private attorney general exception will ultimately eradicate the general rule barring fee awards not specifically authorized by statute.

The present case involves two statutory claims: that the Secretary did not adequately comply with NEPA, and that his action exceeded his authority by virtue of the width limitation contained in the Mineral Leasing Act. The court did not decide the NEPA issues and accordingly, for the reasons stated in the following section, no award for fees related to those issues can be sustained.

As to respondents' Mineral Leasing Act issues, under no conceivable theory can those issues be claimed to involve a statutory scheme of preeminent importance to the Congress. Indeed, Congress responded to the ruling of the court of appeals by amending the statute to eliminate the width restriction relied on by respondents and then *directed* the Secretary to issue permits for a right-of-way which varied in width up to 1000 feet or more. Pub. L. 93-153, 87 Stat. 576 (Nov. 16, 1973). In its subsequent decision on attorneys' fees, the court of appeals itself termed the width requirement in 30 U.S.C. § 185 "anachronistic" and considered it beneficial that Congress had "remove[d] the restrictions of the 1920 statute and permit-[ted] construction of the trans-Alaska pipeline." 495 F.2d at 1033.

Even at the time of its enactment, the provision in question did not reflect any strong congressional

concern, and any policy reflected in the numerical setting of the limitation was not of continuing or consistent importance to ensuing Congresses. The Mineral Leasing Act, while a product of the 66th Congress, had in fact been under consideration since at least 1914, and seven times during that six-year period various forms of the bill had been reported by committees in one or more houses of Congress. Neither in the session of Congress which enacted the Mineral Leasing Act, nor in any of the 1914-1920 era committee reports on similar legislation, is there so much as a mention of the width limitation which ultimately became part of section 20 of the Mineral Leasing Act of 1920.[23]

Thus neither the Congress which enacted the statutory restriction nor the Congress which amended it considered the width limitation of particular importance.[24]

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[23] *See* H.R. Rep. No. 668, 63d Cong., 2d Sess. (1914); S. Rep. No. 947, 63d Cong., 3d Sess. (1915); H.R. Rep. No. 206, 65th Cong., 2d Sess. (1917); H.R. Rep. No. 563, 65th Cong., 2d Sess. (1918); S. Rep. No. 392, 65th Cong., 3d Sess. (1919); H.R. Rep. No. 398, 66th Cong., 1st Sess. (1919); H.R. Rep. No. 600, 66th Cong., 2d Sess. (1920). The only apparent concern over the width limitation is reflected in a floor debate involving a handful of members of the House. Even in this limited discussion, there was no suggestion that the limitation constituted a major or important policy question. *See* 51 Cong. Rec. (Part 15) 15418-23 (1914); 53 Cong. Rec. (Part 2) 1095-96 (1916); 56 Cong. Rec. (Part 7) 7096-98 (1918).

[24] Examination of related and subsequent congressional legislation involving similar grants on land owned by the United States further indicates that there is no basis for ascribing special congressional concern to the specific limitation found in the 1920 Act. Virtually every statute since 1921 dealing with width limitations for right-of-way grants has permitted the executive significant discretion in determining the width of the grant. *See* 43 U.S.C. § 950; 43 U.S.C. § 946; Act of May 28, 1926, 44 Stat. 562; 43 U.S.C. § 956; Act of July 24, 1946, 60 Stat. 643; 43 U.S.C. § 961; 10 U.S.C. § 2668; 42 U.S.C. § 2201; 43 U.S.C. § 931a; 43 U.S.C. § 931c; 7 U.S.C. § 1985(d).

The majority of the court of appeals did not find in the 1920 Act any unique measure of congressional purpose. Faced with this major obstacle to the utilization of the private attorney general doctrine, the majority simply abandoned the requirement that the specific statute in question embody a policy of particular congressional concern:

> It is argued that the width limitation in Section 28 of the Mineral Leasing Act of 1920 does not amount to a congressional policy of preeminent importance. But the dispute in this case was more than a debate over interpretation of that Act.
>
> Appellees' primary argument was that, whatever the width restrictions in the act originally meant, a settled administrative practice to evade those restrictions took precedence. In the final analysis, this case involved the duty of the Executive Branch to observe the restrictions imposed by the legislative, see Freeman v. Ryan, 133 U.S. App. D.C. 1, 3, 408 F.2d 1204, 1206 (1968), and the primary responsibility of the Congress under the Constitution to regulate the use of public lands, Wilderness Society v. Morton, supra, 479 F.2d at 891-893. [495 F.2d at 1032-33.][25]

This rationale creates a private attorney general exception which engulfs the rule so far as federal

[25] This is a serious mischaracterization of what was a good-faith difference of view over the use of administrative practice to support a federal department's interpretation of a statute entrusted to its supervision. The majority itself characterized the position of defendants as "manifestly reasonable and assumed in good faith" (495 F.2d at 1029). The Department's position was based on an administrative practice of over fifty years; obviously there was no conscious intent by the Executive Branch here to avoid limitations imposed by the Congress.

statutes are concerned.[26] If, as the majority asserts, the results in cases such as this are to be based upon Congress' general interest in seeing all of its enactments faithfully enforced, then the requirement for finding a particularly important statutory provision is no longer a part of any private attorney general exception. Any alleged non-compliance with *any* statutory duty would justify invocation of the private attorney general exception.[27]

A brief examination of the product of just the first session of the 92d Congress reveals the unruliness of the concept expressed by the majority below. Of 224 public laws, 211 either pertain directly to the operations of federal departments or agencies or involve federal enforcement of a kind which could

[26] The court of appeals advances a subsidiary rationale which even more obviously tolls the end of the American fee rule, arguing that the doctrine should be abandoned where the fees are small in comparison to the value of the interests being litigated. In such cases, the court contends, there need be no fear that a fee award will discourage good faith litigants from instituting or defending actions to defend their rights. "Where the interest at stake is many times greater than the expected cost of one's appropriate attorneys' fees, any possibility of deterrence is surely remote, if not nonexistent." 495 F.2d at 1032. This standard is unworkable. How is a court to determine at which point the "stakes" are high enough that an award of attorneys' fees will not operate as a deterrent to good faith litigation? The courts are hardly in a position to make complex factual determinations on the practical deterrent impact of a fee award in relationship to the value of the litigation. These are the kinds of essentially legislative decisions which should be made by the Congress rather than the judiciary.

[27] Certainly the responsibility of the Congress to regulate the use of the public lands is not a factor which can logically justify the fee exception here. Congress has an equal interest in all other subjects which were placed in its jurisdiction by the Constitution, *e.g.*, regulation of all matters involving interstate commerce, immigration, imports and exports, and the raising of revenues.

produce statutory violations by federal officials. Only 13 can remotely be characterized as free of any potential involvement by federal officials.[28]

The only alternative to this abandonment of the American fee rule in favor of award under all statutes would be an essentially arbitrary selection by the courts of "qualifying" statutes, based upon an individual judge's conception of the public interest. Petitioner can conceive no objective or rational standards by which such a selection could be made. As the Court of Appeals for the Fourth Circuit has pointed out, courts are ill-suited to make judgments as to which statutes are important. *Bradley* v. *School Board, supra,* 472 F.2d at 330.[29] Moreover, a selection process would invite virtually endless attempts by litigants to have the judicial blessing extended to statutes of interest to them.

The danger of attempting to make determinations as to the importance of a particular policy is pointed up by the decision in this case. Four judges concluded that at least on the NEPA issues, respondents had attempted to vindicate an important policy. Three judges concluded that, far from *vindicating* an important policy, "these plaintiffs have been *frustrating* the policy Congress considers highly desirable and of the utmost urgency." 495 F.2d at 1042.

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[28] *See* Congressional Research Service (Library of Congress), Digest of Public General Bills & Resolutions, 92d Cong., 2d Sess. at 7-72 (1972).

[29] *See also* F. D. Rich Co. v. United States, *supra*, where the Court expressed a similar view on an analogous issue, concluding that it is "better to extricate the federal courts from the morass of trying to divine a 'state policy' as to the award of attorneys' fees in suits on construction bonds." 94 S. Ct. at 2164.

In short, the court of appeals' expansion of the private attorney general doctrine can have only two results—fee shifting under virtually every federal statute, or endless disputes over the selection of "deserving" statutes by the judiciary. Either result is a substantial departure from principles carefully maintained by this Court for more than a hundred years.

C. Fees Cannot Be Awarded Under The Private Attorney General Rationale For Issues On Which Plaintiffs Do Not Succeed

In addition to abandoning the requirement for finding an important congressional policy, the majority below also abandoned the second fundamental element set forth in *Piggie Park, supra,* 310 U.S. at 402: Awards can be made only to parties who *successfully* litigate an issue arising under a statute reflecting unusual congressional concern. This element is found in virtually every lower court case awarding fees on a private attorney general theory. None of the private attorney general cases cited by the court of appeals (495 F.2d at 1029-30) involved an award to an unsuccessful party except *Sierra Club* v. *Lynn,* 364 F.Supp. 834 (W.D. Tex. 1973), which has now been reversed (*see infra* at 4a).

The requirement that fees can only be awarded to a successful party is more than a technicality. Success in litigation is the only objective indicator that some statutory policy was vindicated. Indeed, to abandon the success requirement is doubly wrong, first because it destroys any connection between the litigation and a congressional objective, and second, because it ignores the fact that, by definition, another party *has prevailed* on the relevant issue, and it is both anomalous and unfair for parties to be subjected to

litigation, vindicated by the results, and yet compelled to pay for the other side's legal adventure.

Assuredly, awards cannot be made indiscriminately to any unsuccessful litigant. There must then be a selection, and presumably that selection is to be made on the basis of some perceived contribution to statutory purpose by the unsuccessful party. Yet, as will be developed *infra*, measuring contributions by indicia other than success involves judicial speculation as to whether, and to what extent, beneficial results might have occurred independently of the unsuccessful suit.

The success requirement is the only practical deterrent to ill-considered or frivolous litigation, with its attendant costs to unfortunate and involuntary, but successful, parties, and the attendant imposition upon the resources of the courts. One defender of the private attorney general exception has argued: "There need be no fear that this development will result in a flood of frivolous litigation. . . . [T]he attorney's only source of remuneration will be an award of fees by the court if he is successful."[30] No such assurance can be provided if the success requirement is abandoned.

In the present case, if one ignores the fact that Congress immediately amended the Mineral Leasing Act, respondents can be said to have been successful on some of their Mineral Leasing Act issues. But the court of appeals did not limit its award to issues on which respondents succeeded. Instead, it authorized respondents to recover attorneys' fees for all issues in the case, including NEPA issues.

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[30] P. Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. Rev. 300, 333 (1973).

As to the NEPA issues, it is clear that respondents did not prevail. Respondents argued that the Secretary's environmental analysis was inadequate because he did not fully consider the trans-Canada alternative route. The district court rejected respondents' arguments, finding that the Secretary's decision satisfied the statutory requirements. 4 ERC 1467 (D.D.C. 1972). Four of the seven judges of the court of appeals refused to pass on the NEPA issues. 479 F.2d at 889. The other three judges concluded that the court should have decided the NEPA issues and that the Department of the Interior had fully satisfied its NEPA obligations. *Id.* at 905-12.

Finally, and dispositively, the Congress, whose interest in the application of NEPA affords the only basis for an award of attorneys' fees, promptly and unequivocally expressed its view by making a legislative finding that the Department's efforts were fully adequate. In so doing, Congress firmly rejected, among other things, the contention which had been the principal thrust of respondents before both the district court and the court of appeals: that the pipeline should be built through Canada. As Judge MacKinnon concluded in his dissent:

> [I]t is perfectly obvious that Congress' action in approving the Impact Statement by a rarely used legislative finding amounted to a "total rejection of the arguments made on appeal". . . .
>
> So the efforts of appellants' attorneys with respect to NEPA drew a complete blank. Under such circumstances, it is unreasonable by any fair standard to compensate them for that phase of the case. [495 F.2d at 1039-40.]

Thus, to justify an award of fees for work related to NEPA, the majority below had no choice but to

abandon the requirement of success in order to justify an award of attorneys' fees. In doing so, it dismissed as "not of controlling importance" both the absence of any decision favoring respondents and clear congressional rejection of respondents' position. 495 F.2d at 1034. In the stead of the recognized factor of objective success, the majority turned to a concept of judicially perceived benefit:

> Requiring the Department to draft an impact statement as mandated by law not only benefited the public's statutory right to have information about the environmental consequences of the pipeline. It also led to the refinement of environmentally protective stipulations placed as conditions of the rights-of-way. [495 F.2d at 1034.]

There are compelling reasons for rejecting the concept of subjective benefit which the majority advances —not the least of which is that its factual premise is at least partially incorrect.

While it is true that the Secretary was prepared to issue authority under which a road might be constructed adjacent to the proposed pipeline right-of-way, at the time of the preliminary injunction there was no indication that the Secretary intended to issue the pipeline right-of-way permits immediately. Indeed, the record reflects that the Secretary had told the applicants that no permit would be issued until the Department was "fully satisfied that the environment would be adequately protected."[31] Furthermore, the Secretary had prepared an environmental impact statement dealing with the road, but he had not yet done so with respect to the pipeline right-of-way ap-

[31] Transcript of proceedings in the district court, April 13, 1970, at 25.

plications, because no decision had been made with respect to proceeding on such applications. Government counsel indicated that the Secretary planned to prepare an environmental statement prior to approving any right-of-way application.[32]

The expansive policy adopted by the court of appeals imposes upon the federal judiciary the task, as difficult as it is inappropriate, of weighing what is a benefit to the public interest. The elusive nature of such determinations has been noted by one commentator:

> The term 'public interest', although frequently used here and elsewhere, raises serious conceptual difficulties. In a pluralistic society such as ours, it is difficult to maintain that there is a single public interest or that any particular policy is a priori in the public interest. Substantive approaches to a definition easily reduce to differences in subjective values. [Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. of Pa. L. Rev. 636, 674 (1974).]

Perhaps the best measure of the difficulty of such benefit determinations is afforded by the decision of the court below. While the four members of the majority perceived a benefit, the other three judges concluded that respondents "have been *frustrating* the policy Congress considers highly desirable and of the utmost urgency." 495 F.2d at 1042 (emphasis in original). Against any arguable benefit resulting from respondents pressing their Mineral Leasing Act arguments, the dissent concluded that an overbalancing detriment existed with respect to respondents' "public

[32] *Id.* at 27.

*dis*service in blocking access to the much needed oil at a critical time in our history . . . ." *Id.* at 1043 (emphasis in original).[33] The subsequent congressional action in directing issuance of the permits, declaring the environmental study adequate, and prohibiting further litigation supports this view—as does the tremendous inflation in the cost of the pipeline and the three-year delay in partial relief of the nation from dependence upon oil imports from the Middle Eastern oil producing countries.

Finally, there is the considerable difficulty attendant upon determining questions of causation. There is every reason to believe that respondents' self-congratulatory assumption of credit for virtually every step which the government took in imposing careful environmental controls on the trans-Alaska pipeline and for the scope of the final environmental impact statement (*see* Brief in Opposition to Alyeska's Petition for Writ of Certiorari, at 4-7) cannot be justified by any examination of the underlying facts.

Such an examination would reveal that the Department of the Interior had initiated major and innovative procedures for evaluating the environmental effects of the proposed pipeline well before NEPA had become law, and continued them during the several months between its enactment and the promulgation of regulations concerning the preparation of environmental impact statements. These steps included (1) formation of a multi-agency federal task force, which included seven Interior bureaus, five federal departments, the National Science Foundation and the Office of Science and Technology (A. 79); (2) the formulation of an intial version of "environmental stipulations" (A. 49); (3) the conduct of public hearings in Alaska; (4) posing a wide range of questions to the applicants involving technical and environmental matters; and (5) the formation of a special technical group composed of career government officials with environmental responsibilities (A. 99, 183).

[33] Furthermore, there is a serious conceptual difficulty in basing a fee award for the entire litigation on activities which occurred in its initial stages. The major part of the attorneys' fees which were sought and awarded in the court below were spent in challenging the environmental impact statement which the Interior Department drew up after the preliminary injunction was entered. Assuming for the sake of argument that respondents' efforts were a major factor in generating the initial impact statement, this fact should not justify an award of fees for their subsequent unsuccessful efforts in challenging that impact statement.

All of these events took place before the Council on Environmental Quality, established by NEPA, had promulgated its May 1970 "Interim Guidelines" for complying with NEPA.[34] Indeed, respondents' suit in the district court, which they claim was the catalyst for invoking NEPA procedures and developing the ultimate environmental impact statement, came fully a month and a half before those initial guidelines were available to federal agencies.

The post-NEPA activities of the Department could be described at length. Briefly, they included appointment of a multi-agency Technical Advisory Board, preparation of what was, at the time, the most extensive draft environmental impact statement yet produced by a federal agency, holding public hearings in Alaska and Washington, D.C., formulation of further rounds of questions to the applicants, requiring the applicants to produce a 29-volume detailed description

[34] 35 Fed. Reg. 7390 (May 12, 1970).

of the proposed project, and creation of a major task force composed of career professionals in the environmental fields to prepare the final environmental statement.[31]

Respondents, in the court of appeals and in the brief filed in opposition to certiorari here, have assumed credit for the results of all these activities. In so doing, they overlook the genuine concern with environmental protection which characterized the actions of the highest appointed officials and the host of working-level employees of the Department of the Interior and the many other departments and agencies involved.

Furthermore, they overlook the fact that the Department was, during this period, learning from an unfolding series of judicial interpretations of NEPA the full scope of its NEPA responsibilities. When the Department began its efforts, there were no judicial interpretations of NEPA. Before the final environmental statement was completed, there were hundreds. It would be impossible to trace the impact of each of them on the Department's efforts, but any examination of the facts would reveal that such decisions as *Calvert Cliffs Coordinating Committee, Inc., v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), and *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972), were major forces in shaping the Department's efforts to satisfy NEPA. Their impact was made clear when respondents took the deposition of Secretary Morton. In response to a question concerning the impact of *Natural Resources Defense Council*, the Secretary said of the decision:

> A. This was one of the things that affected it because we got into kind of a new ballgame as far as alternatives are concerned. Let me talk about that for a minute because that is important. When I first got into this business and talked to Pecora and we talked to our lawyers, my Solicitor's Office, I raised the question of what the definition of alternatives was. What is an alternative to an application for a pipeline from Valdez or from Prudhoe Bay to Valdez? Is it another route? Is it another system? Is it a system that is outside of the jurisdiction of the Department of Interior?
>
> All these were questions that were relatively unanswered because the law was new and the law was at that time being concurrently written by decisions that were forthcoming on many aspects of the NEPA Act.
>
> Frankly, my early concepts of what the alternatives were had to be modified as I grew into the job because I felt that the alternatives as I interpreted the Act meant that we were dealing with only alternatives that were within our jurisdiction.
>
> Then, as decisions were made and we began to learn how to operate within the NEPA Act, I had to broaden that a great deal which resulted in my saying some things early on in here that I would not say again at the same time having the same knowledge that I have now . . . . [Deposition of Secretary Morton, R. 225 at 63-64.]

Obviously, respondents are not entitled to claim credit for the impact of other environmental litigation on the Department's efforts, or for unfolding judicial interpretations of NEPA.

[31] The various actions of the Department of the Interior are described more fully in Alyeska's brief in the court of appeals on National Environmental Policy Act issues, at 6-35, A. 178-209.

None of these developments were considered by the majority of the court of appeals, despite their obvious relevance to any conclusion that respondents were entitled to credit for bringing about compliance with NEPA. If there is to be an application of the private attorney general doctrine in favor of parties not prevailing on litigated issues, there must at least be an opportunity to have hearings in the district court on the relationship between claimed benefits and the actions of respondents. The very need for such collateral proceedings to fairly assess such claims demonstrates the lack of wisdom in departing from the requirement that fee awards go only to successful litigants.

D. There Is No Necessity For Any Award Of Fees In This Case; In No Event Is There Justification For An Award In Excess Of The Amounts Actually Paid By Respondents To Their Attorneys

Necessity is the key to justifying any exception to the American fee rule. The private attorney general exception was generated by the need to provide incentive for enforcement efforts by private citizens as well as the necessity of avoiding the unfairness involved where a particular citizen bears the cost of major civil rights litigation efforts. *See Lee* v. *Southern Home Sites,* 444 F.2d 143, 147 (5th Cir. 1971). Where the need to provide an incentive does not exist, the private attorney general rationale is not applicable. *See, e.g., Ross* v. *Goshi,* 351 F. Supp. 949, 956 (D. Hawaii 1972), where the court found that there was "no necessity for an award of fees" because "legal services' attorneys can function as private attorneys-general irrespective of whether the court awards them counsel fees." Similarly, in *Lykken* v. *Vavreck,* 366 F. Supp. 585, 598 (D. Minn. 1973), the court found a fee award to lawyers who agreed to take cases without compensation incompatible with the whole purpose of the private attorney general doctrine.

The instant case presents a different situation from the civil rights cases where unsalaried attorneys seek to represent individual plaintiffs acting to vindicate important individual rights. This case involves litigation conducted by nationwide environmental organizations specifically organized to pursue such litigation. The three organizations involved here, The Wilderness Society, Environmental Defense Fund, and Friends of the Earth, are major litigation institutions. Their combined membership totals over 150,000. They finance litigation all across the United States. Wilderness Society alone has a budget of over $1,600,000. During the last three years, these organizations have been involved in approximately 50 reported court decisions involving environmental issues. The attorneys who represented these organizations in this case were the salaried employees of the plaintiff organizations, or of other organizations, such as the Center for Law and Social Policy, specifically organized to provide litigation assistance on public issues. (R. 70.) With such organizations available, supported by public, tax deductible contributions, these cases will continue to be brought, whether or not fees are awarded. As the three dissenting judges observed:

> [T]he prosecution of litigation of this sort was one of the objects and purposes for which the plaintiff organizations were chartered and existed. We think it unrealistic to say that no suit would have been brought if the plaintiffs had not

> been able to count on the payment by others of the salaries of their staff attorneys. The plaintiffs were equipped and prepared to act, and no added financial encouragement was necessary. [495 F.2d at 1043.] [36]

See also Gray v. *Creamer*, 376 F. Supp. 675, 682 (W.D. Pa. 1974), in which the court refused to award fees under the private attorney general theory where the type of litigation involved clearly needed no financial incentive:

> Certainly the award of attorneys' fees is an encouragement to the bringing of suit and the vindicating of rights which might otherwise not be accomplished. However, the Court takes judicial notice of the virtual flood of prisoners' § 1983 complaints. Little if any encouragement is needed by way of awarding attorneys' fees in a case such as this matter before the Court.

The burgeoning number of environmental cases generally [37] and the number engaged in by these plaintiffs in particular, are further evidence that no incentive need be provided by approving an unsound expansion of the exception to the American nonaward doctrine. The majority considered it "a happy result of [its] decision" that such decision "may increase the willingness of skilled lawyers throughout the nation to undertake public interest litigation on behalf

[36] The dissenters also observed that "counsel for plaintiffs . . . represented to the District Court that there would be no attorneys' fees charged in this case" and that "for the plaintiffs now to claim and be awarded attorneys' fees, in direct contradiction to their sworn representations to the court . . . , is intolerable." 495 F.2d at 1045, 1046.

[37] The Environmental Reporter lists more than 850 reported decisions in the period 1970-1973.

of unmonied clients with just, lawful, and important claims." 495 F.2d at 1038 n. 9. However, when Congress did not deem it necessary to encourage litigation by awarding fees in such cases, the declared efforts of the majority of the court of appeals to do so as a matter of policy seems wholly inappropriate.

In contrast to the situation in many cases involving constitutional rights, no individual is forced to bear the litigation expenses of this or most other environmental suits. The necessity of preventing any unfair litigation burden from falling on a private individual does not exist where major environmental organizations themselves perform a fee-spreading function. The normal operation of the organization spreads the costs of litigation to those who perceive it as beneficial or desirable. Indeed, each of the respondent organizations solicited membership contributions for the very purpose of supporting this suit.

Finally, assuming *arguendo* that *some* award is proper in the circumstances of this case, there is no justification for the holding of the majority that "[t]he fee award need not be limited . . . to the amount actually paid or owed by [respondents]." 495 F.2d at 1037. All counsel for respondents were salaried employees of the complaining organizations, and it would have been simple to calculate an award based on their salaries while working on this case. No greater financial encouragement would serve any useful purpose. Payment of a bonus to respondents' counsel on the theory that they have "vindicated" a public policy in this case merely subsidizes other litigation which may or may not vindicate such a policy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals on attorneys' fees should be reversed and the case remanded to that court with instructions to deny all claims for such fees.

Respectfully submitted,

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APPENDIX

Section 28 of The Mineral Leasing Act of 1920, 41 Stat. 449, 30 U.S.C. § 185 (1970).

Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipeline purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 181 of this title, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipelines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipeline in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable: *Provided*, That the common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality: *Provided further*, That the Government shall in express terms reserve and shall provide in every lease of oil lands under this chapter that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipeline or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this chapter: *Provided further*, That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations and conditions prescribed by the Secretary of the Interior shall be

ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding.

Section 102 of The National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. § 4332 (1973).

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall:

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropiate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

SIERRA CLUB et al., Plaintiffs-Appellants-Cross Appellees,

Edwards Underground Water District et al., Intervenors-Appellants-Cross Appellees,

v.

James T. LYNN, Secretary of the U. S. Department of Housing and Urban Development, et al., Defendants-Appellees-Cross Appellants,

San Antonio Ranch, Ltd., Defendant-Appellee-Cross Appellant,

Texas Water Quality Control, Intervenor.

No. 73–3378.

United States Court of Appeals, Fifth Circuit.

Oct. 4, 1974.

Citizens groups brought action for declaratory and injunctive relief with respect to development of new community under housing and urban development program. State Water Quality Board intervened on behalf of defendants, and underground water district intervened with county on behalf of plaintiffs. The United States District Court for the Western District of Texas at San Antonio, Adrian A. Spears, Chief Judge, 364 F.Supp. 834, entered orders and appeals were taken. The Court of Appeals, Clark, Circuit Judge, held that Secretary of HUD acted neither arbitrarily nor capriciously, nor failed to act in accordance with law when he determined to grant developers of the new community federal assistance under the Urban Growth and New Community Development Act; that environmental impact statement filed by HUD was

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sufficient; that plaintiffs failed to state claim under the Water Pollution Prevention and Control Act; that in absence of proof that developer controlled the government agency's actions or caused its default, it could not be cast in judgment for attorney fees; and that as there remained no unadjudicated claim upon which relief could be granted, trial court improperly retained jurisdiction.

Affirmed in part, reversed in part and remanded.

1. United States ⇐53(9)

Judicial review of decision of Secretary of HUD to guarantee financing for initial development of new community was governed by the Administrative Procedure Act. 5 U.S.C.A. §§ 701 et seq., 706(2)(A); 28 U.S.C.A. § 1331(a).

2. United States ⇐53(9)

Appropriate standard of review of decision of Secretary of HUD to guarantee financing for initial development of new community was whether the Secretary's action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, and reviewing court would determine whether the agency considered all relevant factors in reaching its decision, or whether the decision itself represented a clear error of judgment. 5 U.S.C.A. § 706(2)(A).

3. United States ⇐53(9)

Where none of the facts necessary to sustain plaintiffs' attacks on HUD's compliance with the applicable federal statutes in deciding to guarantee financing for new community were unavailable to plaintiffs or within the exclusive possession or undisclosed by the agency, trial court properly required plaintiffs to establish their claims by a preponderance of the evidence as to each of their claims. 5 U.S.C.A. § 706(2)(A).

4. Courts ⇐406.3(24)

Findings, in action to prevent development of new community pursuant to program of housing and urban develop-

ment, that HUD did not act arbitrarily, capriciously or unlawfully when it found the community to satisfy each statutory condition for federal financing guarantee were not clearly erroneous. New Communities Act of 1968, § 402 et seq., 42 U.S.C.A. § 3901 et seq.; Urban Growth and New Community Development Act of 1970, §§ 701–703, 712, 42 U.S.C.A. §§ 4501–4503, 4513.

5. Health and Environment ⇐25.5

HUD's commitment to guarantee $18,000,000 in bond obligations for development of new community pursuant to program of housing and urban development constituted a "major federal action" significantly affecting the quality of the human environment, subjecting that decision to the full disclosure provisions of the National Environmental Policy Act. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

See publication Words and Phrases for other judicial constructions and definitions.

6. Health and Environment ⇐25.10

Council on Environmental Quality guidelines providing 30-day period for circulation of impact statement for public comment, although highly persuasive, do not govern compliance with the National Environmental Policy Act. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

7. Health and Environment ⇐25.10
United States ⇐53(9)

HUD's commitment to guarantee bond obligations for new community, and HUD's environmental impact statement, were not fatally undermined by the direct participation of the developer and his experts in the underlying environmental and other studies. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

8. Health and Environment ⇐25.10

The National Environmental Policy Act does not permit the responsible federal agency to abdicate its statutory duties

by reflexively rubber-stamping an environmental impact statement prepared by others; the agency must independently perform its reviewing, analytical and judgmental functions and participate actively and significantly in the preparation and drafting process. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

9. Administrative Law and Procedure ⇐476

In absence of bad faith or misplaced reliance, an agency faced with numerous applications for assistance and endowed with finite internal resources to implement congressional policy cannot be expected to ignore useful and relevant information merely because it emanates from an applicant.

10. Health and Environment ⇐25.10

Guidelines of Council on Environmental Quality and the Environmental Protection Agency regulations regarding preparation of environmental impact statements contemplate submission of initial environmental information by the applicant to the agency. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

11. Health and Environment ⇐25.10

HUD did not improperly delegate its statutory responsibilities in preparing environmental impact statement for new community by reason of the participation of the developer and his experts in the underlying environmental and other studies. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

12. Health and Environment ⇐25.10

Inasmuch as district court's order holding in abeyance litigation concerning development of new community under housing and urban development program and developer's agreement to HUD's call for a moratorium on construction effectively maintained the status quo pending completion of addendum to HUD's environmental impact statement, it was not incumbent on court to require that HUD withdraw its

contingent commitment offer. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

13. Health and Environment ⇐25.10

While formally correct environmental impact statements and technical compliance with the National Environmental Policy Act and complimentary guidelines are required, an initial finding of noncompliance must not irrevocably preclude eventual compliance; compliance must be measured by the contents of the final statement. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

14. Health and Environment ⇐25.10

HUD's environmental impact statement for new community was not insufficient on theory it failed to examine the secondary or indirect environmental impacts from expected neighboring "parasite" developments; to set out a cost-benefit analysis of the project; to consider cumulative impacts; to discuss adequately the relationship between local short-term uses of the environment and maintenance and enhancement of long-term productivity; or to treat fully outside comments and opinions. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

15. Health and Environment ⇐25.10

That factors in determining environmental costs and risks with respect to development of new community under housing and urban development program are generally imprecise and unquantifiable does not render impact statement inadequately detailed. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

16. Health and Environment ⇐25.5

National Environmental Policy Act does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

17. Health and Environment ⇐25.10

Sufficiency of environmental impact statement under the National Environmental Policy Act must be judged in light of the nature of the federal action and the underlying implementing federal legislation. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

18. Health and Environment ⇐25.10

Agency providing environmental impact statement must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

19. Health and Environment ⇐25.10

HUD's environmental impact statement with respect to development of community lying on portion of zone of land taking surface waters to underground water-bearing formation supplying water for city of San Antonio was not insufficient by reason of failure to discuss either the acquisition of the recharge zone as a park at a prohibitive cost, or the elimination of all federal assistance to any development over the recharge zone. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

20. United States ⇐53(9)

Statute permitting HUD to plan large-scale projects on federally owned lands does not obligate HUD to search out a competing applicant willing to develop and finance a project on an alternate site or to work up a counterproposal of its own before it can pass on the merits of a properly submitted new community application. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

21. Health and Environment ⇐25.10

HUD's environmental impact statement pertaining to new community application fully complied with the National Environmental Policy Act where it furnished sufficient information to permit a reasoned choice of alternatives so far as

environmental aspects were concerned. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

22. Health and Environment ⇐28

Precautions required by HUD to protect quality of water supplied to residents of city of San Antonio by area on which new community was to be constructed were adequate. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

23. Health and Environment ⇐28

Citizens' groups suing to prevent development of new community to be located astride portion of zone of land supplying water to city of San Antonio failed to state claim for violation of Federal Water Pollution Control Act. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 101(a), 102(a), 301, 309, 33 U.S.C.A. §§ 1251 et seq., 1251(a), 1252(a), 1311, 1319.

24. Federal Civil Procedure ⇐2737.6

In absence of proof that the private party controlled the government agency's actions or caused its default, private party cannot be cast in judgment for attorney fees as a result of the agency's shortcomings even if agency is immune from liability for financial redress.

25. Federal Civil Procedure ⇐2737.6

Citizens' groups which brought action which directly caused HUD's full compliance with National Environmental Policy Act on new community project could not recover attorney fees from developer which successfully defended the lawsuit and which was not shown to have been unreasonable or to have unduly protracted the litigation. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; 28 U.S.C.A. § 2412.

26. Courts ⇐30

Rendition of definitive judgment in suit to prevent development of new community under housing and urban development program ended the litigable aspects of the dispute and, in absence of evidence indicating that HUD would fail to discharge faithfully its statutory functions, trial court improperly retained jurisdiction. 28 U.S.C.A. § 1331(a).

27. Health and Environment ⇐25.5

District court must abjure the role of a quasi-administrative agency for environmental affairs. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

28. United States ⇐53(9)

Judgment and grant of relief disposing of litigation seeking to prevent development of new community under housing and urban development program could compel parties to file in a convenient local public office such reports as they might in the future make that contain material of public interest. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

29. Courts ⇐281

Although mere voluntary cessation of allegedly illegal conduct does not moot a case, federal jurisdiction must be founded upon at least a mere possibility of recurrence which serves to keep the case alive.

Appeals from the United States District Court for the Western District of Texas.

Before WISDOM and CLARK, Circuit Judges, and GROOMS, District Judge.

CLARK, Circuit Judge:

An offer of commitment by the United States Department of Housing and Urban Development (HUD) to guarantee an 18 million dollar private bond issue for the development of San Antonio Ranch New Town (Ranch) spawned this environmentalist litigation against defendants James T. Lynn, Secretary of HUD, and San Antonio Ranch, Ltd., the developer.

Charging violations of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq., and the Urban Growth and New Community Development Act of 1970 (Title VII), 42 U.S.C. § 4501 et seq., four citizens groups (the Sierra Club, Citizens for a Better Environment, League of Women Voters of the San Antonio Area, and American Association of University Women, San Antonio Branch) and their individual members, as plaintiffs, sought declaratory and injunctive relief barring defendants from issuing or accepting either the bond guarantee or any other federal assistance supporting development of the Ranch until the proposed project complied with NEPA and Title VII. Thereafter, the district court permitted the Texas Water Quality Board to intervene on behalf of the defendants, and the Edwards Underground Water District, which had intervened along with Bexar County, Texas on behalf of the plaintiffs, amended its original complaint to allege that development of the Ranch also contravened the Water Pollution Prevention and Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq.

Depending upon which party's view is accepted, the Ranch will be either an urban planner's utopia incarnate or an environmental disaster of the first magnitude. As conceived by the developer, a limited partnership composed of individuals experienced in real estate, construction, financing and new town management, the Ranch will convert 9,318 acres of predominantly virgin Texas hill country land in the northwest quadrant of Bexar County, Texas into a "free standing" new community of 87,972 residents living in 28,676 housing units (41%—single family detached houses, 6%—townhouses, 45%—medium density apartments, and 8%—high density apartments), of which one-fourth will accommodate low and moderate income families, through staged construction over a 30-year period. The Ranch site, which is presently virtually undisturbed and primarily used for ranching, grazing and occasional hunting, is dominated topographically (85%) by hill country and rocky soil characterized by 100 to 200 ft. differentials in elevation. The southern 1200 acres (15%) consists mainly of flat terrain and agriculturally productive soil. An expanding network of regional highways serving the area will be supplemented by an external mass transit system connecting the Ranch to downtown San Antonio, approximately 20 miles away, the South Texas Medical Center, a distance of 10 miles, the University of Texas at San Antonio, a 6-mile trip, and the San Antonio International Airport, currently a 25-minute drive. The developer will contract for essential municipal services and public utilities with the City of San Antonio, whose City Council has adopted a resolution favoring eventual annexation of the entire project.

More than half of the Ranch acreage will be devoted to residential development and internal roads. The project contemplates over 2200 acres of open space, which includes a 2,000 acre greenway system, two 18-hole golf courses, three recreational use lakes, neighborhood recreation centers with swimming pools and tennis courts and a continuous hiking and bicycle trail system. 12,750 employees are expected to work in two industrial and research and development parks totaling 1,234 acres. A 500 acre vocational training and technical center, featuring public or private affiliated educational and training facilities, will staff 430 employees, and it is estimated that 4,480 persons in public jobs will service the Ranch population. Of the 180 acres set aside for commercial use, 150 acres will be devoted to a town center that will act as the gateway to the entire Ranch, providing the focus of civic, entertainment, office employment and shopping activities. Two educational parks and 13 elementary school sites will cover 330 acres. In general the land use plan seeks to take maximum advantage of the area's variation in topography by clustering common or public facilities along an "activity belt," a major right-of-way loop that envelopes the community and laces its components together. The center of the Ranch forms a residential island and the network of canyons affords the basis for a continuous green belt system that will permit a person

to bicycle or walk or horseback ride from the town center to any point within the Ranch without crossing a major thoroughfare.

The spectre of environmental doom is raised by the fact that the proposed development lies astride a portion of the zone of land which takes surface waters to the Edwards Aquifer, an underground water bearing formation that is the sole water supply for the City of San Antonio and 1,000,000 area residents. The aquifer region has been estimated to be approximately 175 miles in length with a varying width of 5 to 45 miles, encompassing a crescent-shaped surface area of 3½ million acres that extends over more than 7 counties. Ground water flows freely (in terms of miles per day) in an easterly direction through the Edwards formation of extremely permeable limestone, which averages 500 feet in thickness, until it is cut by the Balcones fault system. Northwest of the fault the surface limestone is upthrown to form the Edwards Plateau. In this region, honeycombed with fissures and cracks, ground water percolates through the stratum and is found under normal, unconfined water-table conditions. Southeast of the fault line, however, the limestone formation is downthrown, sloping from a surface recharge area near the fault line south and east hundreds of feet below the surface, and overlaid with less permeable and younger rocks, which confine the ground water in the underground reservoir from which San Antonio draws its water supply.

The artesian reservoir is replenished annually with approximately 500,000 acre feet of water from three major sources. Most of the recharge is attributable to 14 surface streams on the Edwards Plateau that flow across fractures and joints in the fault zone, through which water filters down to the aquifer. This recharge zone varies in width from ½ to several miles and extends 80 or more miles above the Balcones fault system. It consists of many small pores and fissures inlaid among less permeable material. The second major source is underflow from one area of the reservoir that recharges

another. Least significant is the recharge produced from rain falling directly on the exposed "outcrops" of limestone in the upthrown region. This precipitation seeps through honeycombed passages and eventually filters its way into the reservoir.

Plaintiffs contend that if water entering the recharge zone is polluted, the entire aquifer will become contaminated. The Balcones Fault dissects the Ranch site latitudinally at the Haby Crossing Fault. Only about 13% of the annual rainfall on the site is eventually introduced to the underground reservoir. The rest is consumed by vegetation, evaporated or removed as surface run-off. Since none of the 14 major stream beds or recharge areas is located on the Ranch, the recharge emanating from the Ranch is generally estimated at only one-half of one percent of the total annual recharge to the aquifer.

The Ranch moved from the drawing board to the bureaucracy when the developer approached HUD in February of 1970 to explore the possibilities of federal assistance under Title VII. Marketing studies had shown that the development envisioned by the preliminary master plan would capture 15% of Bexar County's projected growth. During the prior decade almost half of the county's total population increase (143,000) had occurred in the northwest quadrant, whose influx of residents was expected to continue. Favorably impressed with the planning studies and pre-application proposal, HUD invited the developer to submit a formal application. Eight months later HUD's Office of New Community Development received the formal application and fee of 5,000 dollars and undertook a full agency review of the project.

Early concern for the integrity of the aquifer surfaced in many quarters. At HUD's suggestion the developer retained a geologist-hydrologist, Dr. L. J. Turk, to examine the project. A review of the Ranch was conducted by the Alamo Area Council of Governments, a regional multi-governmental planning organization composed of 16 representatives from the

Edwards Water District, Bexar County and the 11 surrounding counties, which endorsed the project subject to two subsequently adopted conditions: (1) that HUD require thorough environmental impact studies, particularly as to the effect of storm water run-off; and (2) that the sanitary sewer system of the Ranch be connected and treated off the site by the City of San Antonio's regional waste water system. The Texas Water Quality Board and San Antonio city officials were informed of and commented upon the environmental hazards to the aquifer and the steps being taken to protect it. A team of HUD New Community Development staff members, including a civil engineer, a lawyer, an economist, an urban planner, a financial expert and an architect, was formed to prepare an environmental impact statement. The internal agency review of the Ranch's application culminated in a favorable Title VII critique of the project by the Assistant HUD Secretary for Community Planning Development, who submitted his report to the Board of Directors of HUD's Community Development Corporation in August of 1971 before the draft impact statement was circulated for public comment on September 13.

Of 13 public agencies solicited, 7 submitted written comments that were incorporated with comments volunteered by 9 other agencies or groups, including some of the plaintiffs, into the "final" impact statement issued on January 20, 1972 for further circulation and public comment.[1] Just over one month later, on February 23, 1972, convinced that the Ranch was eligible under the Act for a federal financing guarantee of up to 18,000,000 dollars, HUD proffered an offer of commitment that was contingent upon, *inter alia*, the developer's agreement to (1) a moratorium prohibiting development over the recharge zone of the aquifer until completion of a compre-

1. In December of 1971 the Edwards Underground Water District, the San Antonio Independent School District, the Bexar County Commissioners Court and the San Antonio River Authority adopted resolutions opposing urban development over the aquifer. Each resolution was included in an August 1972 addendum to the final environmental impact statement.

hensive environmental study of the recharge zone by the developer and until approval by the HUD Community Development Board and the Texas Water Quality Board of the measures proposed to protect the natural conditions disclosed by the study, (2) review and comment thereon by a public and interagency board organized to the satisfaction of HUD, and (3) the adoption of treatment methods and other continuing measures such as the monitoring of water quality, required by the Community Development Board and the Texas Water Quality Board.

On the same date plaintiffs filed their complaint in this action and sought a temporary restraining order. Without reaching the merits, the district court granted defendants' motion to hold the case in abeyance until the developer had satisfied the conditions in the offer of commitment and executed a project agreement with HUD. Subsequently, HUD formed the San Antonio Water Quality Advisory Review Board, composed of representatives from 18 public agencies and Bexar County, which conducted four separate public meetings and examined the impact of the project on the aquifer. This group inspected four reports submitted by Dr. Turk and the developer's other experts concerning continued studies of storm water and ground water quality at the Ranch, geological mapping of the site and soil renovation of storm water. It also surveyed the developer's plans for sanitary sewage collection and treatment facilities; transportation and storage of dangerous liquids; solid waste storage, collection and disposal; storm water controls; water quality monitoring system; and the legal controls supporting the inspection and enforcement of environmental quality programs.

In addition, HUD retained Dr. Henry V. Beck, a Kansas State University geologist, who, assisted by associates with expertise in environmental health engineering, hydrology and soil mechanics, independently reviewed the environmental studies and aspects of the entire project. Citations of approv-

al of the Ranch by the advisory board and Dr. Beck and their recommendations for improving environmental controls over the aquifer and the water quality monitoring system were forwarded to HUD for consideration and inclusion with additional ecological and the underlying scientific studies in an addendum to the "final" impact statement, which was circulated on August 24, 1972 among 38 public agencies or groups for additional study and comment. The Alamo Area Council of Governments, the San Antonio City Council, Water and Public Service Boards, the Texas Water Quality Board, the Governor's office and the State Department of Health approved the project as environmentally sound and consistent with regional land use planning. In October HUD concluded that the developer had satisfied each of the conditions contained in the letter of commitment and proceeded to commence negotiations leading to a project agreement.

After lengthy pre-trial maneuvering and assimilation of 9 days and 1920 pages of trial testimony, which generated voluminous exhibits, including a seven volume administrative record and three impact statements, the district court denied the relief sought by plaintiffs and entered judgment for the defendants, concluding that HUD had complied with the provisions of each federal statute. Furthermore, the court resolved to retain jurisdiction over the lawsuit for so long as might be necessary to ensure that the proposed environmental safeguards are fully instituted and implemented, and to require the parties to file with the court copies of all data and reports relating to the Ranch and other developments in the surrounding area. Finally, counsel for the plaintiffs were awarded 20,000 dollars in attorneys' fees, costs and expenses to be paid by the defendant developer. Sierra Club v. Lynn, 364 F.Supp. 834 (W.D.Tex.1973).

Plaintiffs appeal from the decision on the merits for defendants, renewing each of their statutory contentions, and asserting that the court improperly saddled them with the burden of proof. They also appeal from the amount of the attorneys'

fees award. The developer cross-appeals from the grant of such fees against it, and Secretary Lynn cross-appeals from the district court's determination to retain jurisdiction. For the reasons that follow, we affirm the decision of the court below on the merits, and reverse its award of attorneys' fees and its retention of jurisdiction.

[1, 2] The district court correctly ruled that it was vested with jurisdiction under 28 U.S.C. § 1331(a) and that plaintiffs possessed standing, *see* Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). It also properly concluded that judicial review of the Secretary's substantive Title VII decision to guarantee financing for initial development of the Ranch project is governed by the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq. Since neither Title VII nor the APA requires the agency to conduct a hearing or make formal findings when passing on new community applications, the appropriate standard of review is whether the Secretary's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). Under this standard the appellate court must determine whether the agency considered all relevant factors in reaching its decision, or whether the decision itself represents a clear error in judgment.

> Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The court must then determine, according to the standards set forth in §§ 101(b) and 102(1) of the Act, whether "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." Calvert Cliffs' Coordinating Committee v. U. S. Atomic Energy Commission, 146 U.S.App. D.C. 33, 449 F.2d 1109, 1115 (1971).

Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 300 (8th Cir. 1972), cert. denied, 412 U.S. 931, 93

S.Ct. 2749, 37 L.Ed.2d 160 (1973). "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971).

[3] In a motion to the trial court plaintiffs asserted that "once a prima facie showing has been made that the federal agency has failed to adhere to the requirements of NEPA, the burden must, as a general rule, be laid upon this same agency which has the labor and public resources to make the proper environmental assessment and support it by a preponderance of the evidence contained in the impact statement." Sierra Club v. Froehlke, 359 F.Supp. 1289, 1335 (S.D.Tex.1973), reversed sub nom., Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974). Without formally responding, the district court apparently applied the standard burden of proof—plaintiffs were required to establish their claims by a preponderance of the evidence without any tactical shifting of that burden. Since none of the facts necessary to sustain plaintiffs' attacks on HUD's compliance with the applicable federal statutes were unavailable to the plaintiffs or within the exclusive possession of or undisclosed by the agency, the district court properly imposed the standard evidentiary burden on plaintiffs as to each of their claims. Sierra Club v. Callaway, 499 F.2d 982, 992 (5th Cir. 1974); *see* Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974).

I.

The Urban Growth and New Community Development Act

Increasing concern over the deterioration of urban life led Congress to enact The Urban Growth and New Community Development Act as Title VII of the Housing and Urban Development Act of 1970, Pub.L. No. 91–609, 84 Stat. 1791, expanding a similar program that was authorized by the Housing and Urban Development Act of 1968, see 42 U.S.C.

§ 3901 et seq. Over the last century the increasingly mobile quality of life in America has produced a pattern of population redistribution in which the migration of persons from rural areas to a small number of densely populated, congested central cities is followed by the flight of middle and higher income families and businesses from these urban centers to the suburbs. This pattern of movement has resulted in a polarization of the residents of city and suburbia by income, race, education, social philosophy and life style.

In order to treat the source rather than the symptoms of such social, economic and environmental problems, Title VII was designed (1) "to provide for the development of a national urban growth policy," 42 U.S.C. §§ 4501–4503, and (2) "to encourage the rational, orderly, efficient, and economic growth, development, and redevelopment of our States, metropolitan areas, . . . and communities in predominantly rural areas . . . [and] the prudent use and conservation of our natural resources by assisting public and private efforts in the development of well-planned, comprehensive new communities that will contribute to better environments, produce improved living conditions, add to the supply of adequate housing, especially for persons of low and moderate income, promote sound economic growth and employment and provide a viable alternative to disorderly urban growth. 42 U.S.C. § 4501; *see also* 42 U.S.C. § 4511(f). To achieve its broad commitment, Congress envisioned that the federal government, acting through the Community Development Corporation, 42 U.S.C. § 4532, would assist four general types of new communities:

(1) Economically balanced new communities within metropolitan areas, which would serve as alternatives to urban sprawl;

(2) Additions to existing smaller towns and cities which can be economically converted into growth centers to prevent decline and accommodate increased population;

(3) Major new-town-in-town developments to help renew central cities, including the development of areas adjacent to existing cities, in order to increase their tax base; and

(4) Free standing new communities where there is a clear showing of economic feasibility, and which would be built primarily to accommodate expected population growth.

H.R.Rep. No. 91-1556, U.S.Code Cong. & Admin.News, 91st Cong., 2d Sess., at pp. 5582, 5587-5588 (1970). As a result of its study of the problem, Congress found that the development of such new communities on a national scale had been crippled by the financial and administrative difficulties "of raising a large initial investment which would yield a delayed, irregular cash return; of assembling suitable sites of sufficient size; and in coordinating site and related improvements among all involved public and private sectors," Sierra Club v. Lynn, *supra*, 364 F.Supp. at 838; *see* 42 U.S.C. § 4511(e). Thus Congress provided in the Act for several forms of federal assistance including guarantees of the debt obligations of public and private new community developers to assist in financing land acquisition and development and in constructing public facilities, 42 U.S.C. § 4514.[2]

2. The eligibility requirements for Title VII financing guarantees are codified at 42 U.S.C. § 4513:

(a) A new community development program is eligible for assistance under this part only if the Secretary determines that the program (or the new community it contemplates)—

(1) will provide an alternative to disorderly urban growth, helping preserve or enhance desirable aspects of the natural and urban environment or so improving general and economic conditions in established communities as to help reverse migration from existing cities or rural areas;

(2) will be economically feasible in terms of economic base or potential for economic growth;

(3) will contribute to the welfare of the entire area which will be substantially affected by the program and of which the land to be developed is a part;

(4) is consistent with comprehensive planning, physical and social, determined by the Secretary to provide an adequate basis for evaluating the new community development program in relation to other plans (including State, local, and private plans) and activities involving area population, housing and development trends, and transportation, water, sewerage, open space, recreation, and other relevant facilities;

(5) has received all governmental reviews and approvals required by State or local law, or by the Secretary;

(6) will contribute to good living conditions in the community, and that such community will be characterized by well balanced and diversified land use patterns and will include or be served by adequate public, community, and commercial facilities (including facilities needed for education, health and social services, recreation, and transportation) deemed satisfactory by the Secretary;

(7) makes substantial provision for housing within the means of persons of low and moderate income and that such housing will constitute an appropriate proportion of the community's housing supply; and

(8) will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services.

(b) A new community development program approved for assistance under this part shall be undertaken by a private new community developer or State land development agency approved by the Secretary on the basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion.

After a developer has successfully traversed the application process and accepted an offer of commitment, the terms and conditions under which he must operate are negotiated with HUD and executed in a project agreement. A trust indenture and a development plan are required and must set out (i) all physical, environmental, planning and construction commitments over the 30-year development period, (ii) social goals and special features of the project, (iii) special studies required of the developer with respect to technological innovations and other aspects of the project incapable of resolution prior to execution, and (iv) the pace, scope and detail of the developer's undertakings in terms of 1-year, 3-year and long-term periods. These documents are incorporated into the project agreement and, hence, are enforceable at law. In addition, the developer is required each year to submit a new 1-year and 3-year plan and, if changed conditions warrant substantial alterations, a revised long-term plan. Substantial changes in

any part of the development plan require approval by the Secretary.

The dynamic nature of the project's development process is intended to encourage flexibility in planning and to take advantage of new technology, research and innovation in the design and execution of new community development. A specific provision in the plan, which states that "[t]he developer shall comply with such further reasonable standards for environmental quality control as the Secretary may prescribe after consultation with other federal agencies pursuant to the National Environmental Policy Act of 1969," assures that other federal agencies retain influence over the developer's activities regarding environmental quality after the agreement has been executed. Moreover, another provision extends the developer's commitment to maintain environmental quality control for such additional period of time after completion of development as the Secretary may determine to be appropriate, and HUD states that it will prepare draft and final environmental statements with respect to any subsequent major actions connected with any such project, *i. e.* actions that have significant environmental quality implications.

[4] Plaintiffs contend that the Ranch (1) does not comport with the eight goals of the national urban growth policy announced by Congress;[3] (2) will promote the ten undesirable consequences which Congress found to result from unregulat-

3. (d) The Congress further declares that the national urban growth policy should—

(1) favor patterns of urbanization and economic development and stabilization which offer a range of alternative locations and encourage the wise and balanced use of physical and human resources in metropolitan and urban regions as well as in smaller urban places which have a potential for accelerated growth;

(2) foster the continued economic strength of all parts of the United States, including central cities, suburbs, smaller communities, local neighborhoods, and rural areas;

(3) help reverse trends of migration and physical growth which reinforce disparities among States, regions, and cities;

ed patterns of urban development,[4] and (3) fails to meet the eligibility requirements for federal assistance under the Act. The district court concluded that HUD did not act arbitrarily, capriciously or unlawfully when it found the Ranch to satisfy

(4) treat comprehensively the problems of poverty and employment (including the erosion of tax bases, and the need for better community services and job opportunities) which are associated with disorderly urbanization and rural decline;

(5) develop means to encourage good housing for all Americans without regard to race or creed;

(6) refine the role of the Federal Government in revitalizing existing communities and encouraging planned, large-scale urban and new community development;

(7) strengthen the capacity of general governmental institutions to contribute to balanced urban growth and stabilization; and

(8) facilitate increased coordination in the administration of Federal programs so as to encourage desirable patterns of urban growth and stabilization, the prudent use of natural resources, and the protection of the physical environment.

42 U.S.C. § 4502(d).

4. (b) The Congress further finds that continuation of established patterns of urban development, together with the anticipated increase in population, will result in (1) inefficient and wasteful use of land resources which are of national economic and environmental importance; (2) destruction of irreplaceable natural and recreational resources and increasing pollution of air and water; (3) diminished opportunity for the private homebuilding industry to operate at its highest potential capacity in providing good housing needed to serve the expanding population and to replace substandard housing; (4) costly and inefficient public facilities and services at all levels of government; (5) unduly limited options for many of our people as to where they may live, and the types of housing and environment in which they may live; (6) failure to make the most economic use of present and potential resources of many of the Nation's smaller cities and towns, including those in rural and economically depressed areas, and decreasing employment and business opportunities for their residents; (7) further lessening of employment and business opportunities for the residents of central cities and of the ability of such cities to retain a tax base adequate to support vital services for all their citizens, particularly the poor and disadvantaged; (8) further separation of people within metropolitan areas by income and by race; (9) further increases in the distances between the places where people live and where they work and find recreation; and (10) increased cost and decreased effectiveness of public and private facilities for urban transportation.

42 U.S.C. § 4511(b).

each section 4513 condition for the 18,000,000 dollar federal financing guarantee.[5] None of these district court findings can be characterized on this record as clearly erroneous. Furthermore, the national urban growth policy and the detrimental effects of present patterns which Congress codified operate only as guideposts to inform the Secretary's discretion and judicial review of his substantive decision. Neither creates any judicially enforceable rights.

Urging that HUD made no studies of the Ranch's impact on San Antonio urban problems (transportation facilities, minority and low income distribution, inner city tax base, balanced growth or revitalization of the central city), plaintiffs argue that the Ranch cannot be consistent with comprehensive planning for the entire urban area, as required by section 4513(a)(4) and HUD regulations (since no such plan exists),

5. The findings were:
(1) The project will provide an alternative to disorderly urban growth;
(2) It will be economically feasible, in that it will capture more than 15% of the projected growth of Bexar County, because of its wide range of housing amenities and the superior environment;
(3) It will contribute to the welfare of the entire area, as existing septic tanks will be replaced with storm and sanitary sewers, and as industrial and commercial facilities will be placed in a setting encompassing a broad price range of housing;
(4) It is consistent with comprehensive physical and social planning;
(5) It has received all governmental reviews and approvals required by State or local law;
(6) It will contribute to desirable living conditions in the community, and will be characterized by well balanced and diversified land use patterns, and will include or be served by adequate public, community, and commercial facilities;
(7) It makes substantial provision for housing within the means of persons of low and moderate income;
(8) It will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services; and
(9) A basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion has been shown.
Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839.

and that Bexar County, which must become responsible for governing and servicing the development, was never asked to approve the Ranch, as mandated by section 4513(a)(5).

The administrative record demonstrates that from the beginning HUD conceived of the Ranch as an integral element of the entire San Antonio community. The myriad economic, marketing, environmental and urban studies indicated that the project would provide a viable alternative (preserving and enhancing the existing natural amenities) to the rapid and disorderly urban growth projected for the northwest quadrant of Bexar County, an area devoid of governmental land use regulations or comprehensive water resource management planning. It is anticipated that this growth phenomenon will be exacerbated by the nearby construction of the University of Texas at San Antonio and the South Texas Medical Center. Thus, the orderly development of the Ranch should advance the goals of Title VII by retarding the expected and otherwise inevitable urban sprawl over the aquifer through implementation of a comprehensive land use plan which institutes demanding environmental controls in an ecologically sensitive area as well as by contributing to the welfare of the entire San Antonio community.

HUD evaluated the project's feasibility and its interrelation with the City of San Antonio by examining regional growth trends, population and employment distribution, market potentials, adequacy of regional transportation facilities and the long-term fiscal and economic impact of the Ranch on its adjacent political jurisdictions. These areas of concern were treated in the August 1971 report of the Assistant Secretary of HUD to the Community Development Board of Directors. He examined and the Board approved the Ranch with respect to each requirement of section 4513 and all applicable HUD regulations. To allay fears that the Ranch would counteract efforts to revitalize the downtown area of San Antonio, the developer submitted expert studies to the City Council that indicated a minimally harmful, if not an overall beneficial,

economic impact on the city and its tax base from the project. As a result the City Council rescinded its prior unfavorable position as to the Ranch and in February of 1972 voted to adopt a resolution supporting annexation of the Ranch in the future and to execute an agreement of cooperation with the developer: (a) to institute measures to protect the Edwards reservoir from pollution, (b) to channel all urban-type federal grants through the City, (c) to seek assistance from the developers with the planning, analysis and feasibility studies for a possible Title VII new-town-in-town project in San Antonio, and (d) to provide water, gas, electricity, sewerage and other municipal services to the Ranch under contract with the developer. In responding to comments to the "final" environmental impact statement, HUD stated that it would give full consideration to a new-town-in-town community in San Antonio regardless of the final action it took as to the Ranch.

Not only did both HUD and the developer endeavor to work closely and cooperate fully with state, local and city officials, the record also shows that the Ranch project "is consistent with comprehensive planning . . . determined by the Secretary to provide an adequate basis for evaluating the new community development program in relation to other [state, local and private] plans and activities . . .," 42 U.S.C. § 4513(a)(4), and "has received all governmental reviews and approvals required by State or local law, or by the Secretary," 42 U.S.C. § 4513(a)(5).

At the project's inception, no governmental entity exercised planning authority over the proposed site. "[N]either governmental controls over land use nor comprehensive and cohesive water resource management plans then existed in this area of Bexar County." Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839. Bexar County, which was the only governmental body with jurisdiction over the entire ranch, had only residential subdivision regulations. Consequently, HUD selected the Alamo Area Council of Governments to conduct a review of the Ranch in compliance with the Office of Management and Budget Circular A-95, which in general requires that an applicant for Title VII assistance notify the appropriate clearing house for the area in which the project is located of its intent to apply for such assistance in order to afford the clearing house and other interested local agencies an opportunity to comment on the proposed project. The district court determined that "the Alamo Area Council of Governments . . ., the Water Board of the City of San Antonio, the City of San Antonio Public Service Board, the Texas Water Quality Board, the Governor's office, and the Northside Independent School District had reviewed the project and decided that [the Ranch] was consistent with the comprehensive regional plan." 364 F.Supp. at 839.

Title VII does not state that the existence of a comprehensive regional land use plan is a condition precedent to federal assistance or that if no such plan is in effect, the Secretary must exercise his statutory authority to make comprehensive planning grants available to official governmental planning agencies where rapid urbanization is expected to occur on property to be developed as a new community, *see* 40 U.S.C. § 461. In this vein, draft HUD regulations provide that "the area within which a new community is to be situated must be covered by a comprehensive areawide plan *or by ongoing planning promulgated or carried on by a duly authorized agency*." Proposed HUD Reg. § 32.7(f), 36 Fed.Reg. 14208 (1971) (emphasis added). These regulations also state that the comprehensive planning for the area must, in the secretary's judgment, be sufficiently detailed to provide a reasonable basis for evaluating the relationship of the proposed new community to other state, local and private plans and activities and that in those areas with a regional planning agency certified by the secretary, consistency must be found between the new community and the planning conducted by such agencies.

Plaintiffs do not assert that the Alamo Area Council was improperly certified by HUD or defaulted in its A-95 and regional planning responsibilities. There is no evidence that the council (among whose 16 members were representatives from plaintiff-intervenors, Edwards Underground Water District and Bexar County) inadequately discharged its planning and reviewing functions or erroneously determined that the Ranch was a viable project. Its conclusions were independently corroborated by various other local governmental agencies and were approved by the district court. Finally, that no official endorsement of the Ranch by Bexar County is required by state law is verified by a letter to HUD approving the Ranch from Bexar County Commissioners Court Judge Blair Reeves, who stated that though the county had no planning or zoning responsibility under existing state law, he found the project to be consistent with the San Antonio metropolitan area goals. This point was mooted in April of 1974 when the City Council of San Antonio voted to extend the city's extra-territorial jurisdiction over the Ranch from 58% to 100% of the proposed site.

The record before us does not support the claim that HUD failed to consider all relevant Title VII factors in reaching its decision or that the decision itself manifests a clear error in judgment. The legislative history of Title VII and HUD regulations thereunder clearly contemplate federal assistance for "free standing and self-sufficient new communities away from existing urban centers where there is a clear showing of economic feasibility, primarily . . . to accommodate [expected] population growth," as well as for new communities in metropolitan areas that are designed to combat urban sprawl and to renew deteriorating central cities. *See* proposed HUD Reg. § 32.7(a), 36 Fed.Reg. 14207 (1971). We hold that Secretary Lynn acted neither arbitrarily nor capriciously, nor failed to act in accordance with law when he determined to grant the developers of the Ranch federal assistance under the Urban Growth and New Community Development Act.

II.

National Environmental Policy Act of 1969

[5] NEPA was enacted to promote a national policy of "productive and enjoyable harmony between man and his environment," 42 U.S.C. § 4321, by demanding attention to environmental values and instituting an implementing methodology which would assure that these values were incorporated in agency planning and decision making processes. Because HUD's commitment to guarantee 18,000,000 dollars in bond obligations for the Ranch constituted a major federal action "significantly affecting the quality of the human environment," that decision became subject to the "full disclosure" provisions of NEPA, 42 U.S.C. § 4332(2)(C). As a result HUD filed three environmental impact statements—a draft statement on September 13, 1971, a final statement on January 20, 1972, and an addendum to the final statement on August 24, 1972.

The district court concluded that the final statement, as supplemented by the addendum, "though possibly not completely exhaustive in every respect, is sufficient to permit a reasoned decision as to the environmental effects of [the Ranch]" and "meets all the requirements for the 'detailed statement' required by NEPA . . . ." 364 F.Supp. at 842. Furthermore, the court determined that the Secretary's substantive commitment decision was neither arbitrary nor capricious nor an abuse of discretion since "HUD has complied with the goal of NEPA, . . . by '[using] all practicable means, consistent with other essential considerations of national policy' to carry out our nation's environmental policy." 364 F.Supp. at 844.

Plaintiffs attack these findings, contending that (1) the agency's offer of commitment to the developer was in violation of HUD regulations and Council on Environmental Quality guidelines since it was extended before the thirty-day period for circulation of the impact statement for public comment had expired; (2) the final statement and addendum

are unacceptable because both were improperly delegated to and represent the work product of the developer and his experts with little independent analysis or input from HUD and because the offer of commitment was not withdrawn pending completion of the additional environmental studies; (3) the supplemented final statement does not measure up to the requirements of NEPA; and (4) HUD's decision of commitment is arbitrary and capricious since it gave insufficient weight and consideration to environmental factors. In related contentions, plaintiffs assert that HUD's treatment of alternatives to the proposed project in the statement was deficient and that in accordance with the Urban Growth and New Community Development Act, HUD was obligated to consider and develop the suitability of alternative sites for the project.

To support their first issue—procedural irregularities at the agency vitiated HUD's offer of commitment—plaintiffs point to an October 1971 decision by the Community Development Board of Directors "to authorize an offer of commitment at the earliest appropriate time" and to a "draft" offer of commitment allegedly communicated from HUD to the developer on February 15, 1972, a date well before expiration of the thirty-day statement circulation period required by guidelines of the Environmental Protection Agency, 40 C.F.R. § 6.15 (1973), the Council on Environmental Quality, 40 C.F.R. § 1500.11(b), 38 Fed.Reg. 20556 (1973), and HUD regulations, HUD Handbook 1390.1(5.)(d.)(2), 38 Fed.Reg. 19187 (1973). Furthermore, plaintiffs argue that since the final statement, dated and filed with the Council on Environmental Quality on January 20, was not received until three days later, the February 23 offer of commitment also preceded expiration of the circulation period.

[6] The short answer is that the Council on Environmental Quality guidelines, although highly persuasive, do not govern compliance with NEPA. Sierra Club v. Callaway, *supra*; Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973). The draft HUD Title VII Regulations, which have never been formally adopted, were uppermost in the minds of the Community Development Board of Directors at their February 15 meeting when they authorized Assistant Secretary Jackson "to determine at the expiration of the thirty-day period whether an offer of commitment should be issued . . . . ." More importantly, the record is clear that the February 23 offer of commitment followed the circulation of the impact statement to the Council on Environmental Quality and other public agencies and groups by more than the specified thirty days. Finally, that conditional offer was lawfully issued pursuant to 42 U.S.C. §§ 4513, 4514, and draft HUD regulations. Proposed HUD Reg. § 32.23, 36 Fed.Reg. 14212–13 (1971).

[7, 8] Neither is the commitment offer or the impact statement fatally undermined by the direct participation of the developer and his experts in the underlying environmental and other studies. There is no NEPA prohibition against a state agency, financially interested private contractor or a new community applicant providing the federal agency, which must of necessity work closely with these parties, data, information, reports, groundwork environmental studies or other assistance in the preparation of an environmental impact statement. *See* Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849 (8th Cir. 1973); Citizens Environmental Council v. Volpe, 484 F.2d 870 (10th Cir. 1973), cert. denied, —— U.S. ——, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974). NEPA demands only that "the applicable federal agency must bear the responsibility for the ultimate work product designed to satisfy the requirement of § 102(2)(C)." Life of the Land v. Brinegar, 485 F.2d 460, 467 (9th Cir. 1973), cert. denied, —— U.S. ——, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974). NEPA's commands, however, do not permit the responsible federal agency to abdicate its statutory duties by reflexively rubber stamping a statement prepared by others. The agency must independently perform its reviewing, analytical and judgmen-

tal functions and participate actively and significantly in the preparation and drafting process. *See* Greene County Planning Board v. F.P.C., 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed.2d 90 (1972). HUD did no less here.

Non-degradation of the aquifer and ranch environment were paramount considerations throughout the entire HUD review of the Ranch application. To this end an inter-disciplinary team of New Communities Development staff members prepared and compiled each of the three environmental statements after independently reviewing data, information and comments provided by the developer's experts and other interested public agencies and groups. To obtain further verification, HUD retained a geologist and his staff of three associates to supervise and analyze the supplemental environmental studies and review every aspect of the project, especially the water quality monitoring program and the proposed environmental controls. His report and favorable conclusions were included with those studies in the addendum prepared by the New Communities Development staff.

[9–11] In the absence of bad faith or misplaced reliance, an agency faced with numerous applications for assistance and endowed with finite internal resources to implement congressional policy, cannot be expected to ignore useful and relevant information merely because it emanates from an applicant. This does not mean it may substitute the applicant's efforts and analysis for its own. The guidelines of the Council on Environmental Quality and the Environmental Protection Agency regulations regarding preparation of impact statements clearly contemplate submission of initial environmental information by the applicant to the agency. *See* EPA Reg., 40 C.F.R. § 6.21(c) (1973); CEQ Guidelines, 40 C.F.R. § 1500.7(c), 38 Fed.Reg. 20553 (1973); *see also* HUD Handbook 1390.1(5.), 38 Fed.Reg. 19184–87 (1973). In view of HUD's active participation and independent preparation of the impact statement and addendum, the district court did not

err when it failed to conclude that the agency improperly delegated its statutory responsibilities to the developer.

Whenever an agency decision to act precedes issuance of its impact statement, the danger arises that consideration of environmental factors will be *pro forma* and that the statement will represent a *post hoc* rationalization of that decision. NEPA was intended to incorporate environmental factors and variables into the decisional calculus at each stage of the process. "This means that draft statements on administrative actions should be prepared and circulated for comment prior to the first significant point of decision in the agency review process." CEQ Guidelines, 40 C.F.R. § 1500.7(a), 38 Fed.Reg. 20552 (1973). The impact statement is the central, independent component of NEPA's decision-making methodology since it "provides a basis for (a) an evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action." Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 458 F.2d 827, 833 (1972).

[12, 13] In this case, HUD's draft statement preceded its first significant decision, the October 1971 authorization by the Community Development Board of Directors of an offer of commitment at the earliest appropriate time. However, that the draft and final statement were totally inadequate under NEPA is signaled by HUD's conditioning its offer on a comprehensive study of the recharge zone and on Community Development and Texas Water Quality Board approval of the measures to be instituted to protect the aquifer. The "final" impact statement itself acknowledged the lack of knowledge regarding the effect on the aquifer of storm water run-off, which it identified as the major pollution threat, and called for further investigation before, during and after construction of the Ranch. Because the district court's order holding this litigation in abeyance and the developer's agreement to Hud's call for a moratorium on construction effectively maintained

the status quo pending completion of the August addendum, it was not incumbent on the court below to require that HUD withdraw its commitment. The offer was contingent, stating that the Community Development Board "is under no obligation to enter into a project agreement or to guarantee your debt obligation until and unless" the Board has affirmatively found that each specified condition has been met. Post-submission efforts to rehabilitate the statement to comport with NEPA's provisions or to minimize adverse environmental consequences and maximize benefits should not be barred by initial inadequacies. The goal of NEPA is a better environment. While formally correct statements and technical compliance with the Act and complimentary guidelines are required, an initial finding of section 102 noncompliance must not irrevocably preclude eventual compliance. HUD's compliance with NEPA must be measured by the contents of the final impact statement as supplemented by the later addendum.

[14] As a further point in their multifaceted appellate offensive, plaintiffs contend that the supplemented statement did not comply with section 102(2)(C) because it failed (1) to examine the secondary or indirect environmental impacts from expected neighboring "parasite" developments; (2) to set out a cost-benefit analysis of the project; (3) to consider cumulative impacts; (4) to discuss adequately the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) to treat fully outside comments and opinions. A cursory examination of the impact statement, addendum and supporting documents demonstrates each of these assertions' lack of substance.

The supplemented statement pointed to statistics indicating continued explosive population growth in the northwest quadrant of Bexar County and the probabilities that the influx of unregulated, low density subdivisions would be accelerated by the expanded network of regional highways and that the

Ranch would tend to attract parasite settlements by as many as 40,000 persons along its outskirts. The statement also warned of the concomitant need for appropriate land use and zoning controls to protect the aquifer from accompanying septic tank discharge and other pollution and to insure that such developments were consistent with the plan, patterns and controls established for the Ranch. The developer promised to cooperate with the Alamo Area Council, the City of San Antonio and the Texas Water Quality Board in establishing the necessary regulatory controls. Moreover, in responding to the district court's order requiring the Edwards Water District and Texas Water Quality Board to file with the court semi-annual reports as to development over the aquifer, its effect and the environmental control measures being implemented, the Water Board indicated that it intended to incorporate virtually all of the HUD requirements imposed on the Ranch into an order regulating all development activities over the aquifer.

[15, 16] Similarly, exhibits in the addendum disclosed the expected cumulative impact of the Ranch on population distribution, land use patterns and the financial and economic resources of Bexar County and the surrounding areas. Unavoidable adverse environmental effects, irretrievable commitments of resources and other environmental costs and risks were identified and found not to outweigh the benefits of the Ranch in protecting and enhancing the Ranch site as well as avoiding the onset of urban sprawl. That the factors in this cost-benefit analysis are generally imprecise and unquantifiable does not render the result inadequately detailed. NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula. Land use regulation over the aquifer was seen to advance its long-run productivity as against the adverse short- and long-term effects of uncontrolled development. Advance planning, careful monitoring of water quality and stringent environmental controls should assure the continued in-

tegrity of the aquifer if such measures are extended throughout the recharge zone. Finally, all comments received as to each statement during the circulation period were attached and included in the supporting documentation. Many of the responses to the draft statement and HUD's replies thereto are reflected in the two succeeding statements.

"NEPA requires that an agency must—to the *fullest* extent possible under its other statutory obligations—consider alternatives to its action which would reduce environmental damage." Calvert Cliffs' Coordinating Committee v. AEC, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1128 (1971). In its discussion of alternatives, HUD proposed (a) taking no action, (b) requiring actions of a substantially different nature that would provide similar benefits with varying environmental impacts and (c) approving a project of different size, scope or design with less significant environmental impacts. The no action alternative was unattractive since anticipated uncontrolled development over the recharge zone posed a greater threat to the aquifer. Just as adverse impacts could not be avoided by refusing financial assistance to the Ranch, neither could they be precluded by delaying the project 3 to 5 years until proposed but unenacted state or federal land use legislation might result in a comprehensive plan for the recharge zone. The second alternative encompassed approving the project on a site off the recharge zone. This proposal was discarded because it would produce the same adverse environmental results as no action and would not satisfy the demand for housing in the northwest quadrant of Bexar County. Approval of a project smaller in scope or of less costly design on the Ranch site under the third alternative would not provide the housing necessary to accommodate most of the area's potential residents. Neither would it incorporate the economies of planning and funding to be found in a larger project nor exert such a beneficial influence on the surrounding area.

Asserting that HUD's discussion of alternatives is conclusory, superficial and self-serving, plaintiffs contend that the

impact statement is fatally deficient because it fails to mention the acquisition of the recharge zone as a park or game preserve, the modification or elimination of federal assistance programs so as to discourage development over the recharge zone, the development of a different type or design of new community in another area of Bexar County, or any consideration or development of alternative sites for the project off environmentally sensitive areas. In a related contention, plaintiffs argue that Title VII, which is a guidepost for application of NEPA in this urban-suburban setting, compels HUD to consider alternative locations for new communities in evaluating an application for Title VII assistance.

[17, 18] It is true that the scope and extent of HUD's treatment of alternatives was less than exhaustive. Its sufficiency under NEPA, however, must be judged in light of the nature of the federal action and the underlying implementing federal legislation. The agency must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide, *see* Natural Resources Defense Council, Inc. v. Morton, *supra*. Nevertheless, compliance with the NEPA command that an agency "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources," 42 U.S.C. § 4332(2)(D), must be judged against a rule of reason. "There is no need for an [impact statement] to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative." Life of the Land v. Brinegar, *supra*, 485 F.2d at 472.

[19, 20] In this light the statement cannot be condemned for its failure to discuss either the acquisition of the recharge zone as a park at a prohibitive cost, or the elimination of all federal assistance to any development over the recharge zone. Furthermore, HUD's Title VII responsibility is limited to

approving or disapproving, in accordance with the statute's provisions, new community applications. Although the Act permits HUD upon specific authorization of the President "to plan and carry out large-scale projects" on federally owned lands to demonstrate the development of and serve as models for new communities, 42 U.S.C. § 4524, this statutory authority does not obligate the agency to search out a competing applicant willing to develop and finance a project on an alternate site or to work up a counter-proposal of its own before it can pass on the merits of a properly submitted new community application. "There can be no merit to plaintiff's claim that HUD cannot approve an otherwise eligible project merely because they have discovered vacant land in an area that they believe may be better suited for a new community than the existing site." Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839.

[21] None of the alternative sites in Bexar County suggested by the plaintiff met all the eligibility requirements of Title VII. Absent a competing applicant, HUD's prerogatives ultimately consisted of accepting or rejecting the application before it. The impact statement explored the consequences of both courses of action. If HUD is to discharge fully its Title VII and NEPA duties, it must also review the available alternatives in planning, design and placement of a new community. The impact statement adequately discussed these aspects of the Ranch. When the statement is read with its supporting documentation, it furnishes sufficient information "to permit a reasoned choice of alternatives so far as environmental aspects are concerned." Natural Resources Defense Council, Inc. v. Morton, *supra*, 458 F.2d at 836. Since the statement was not deficient in approach and reflected a basis in good faith objectivity, we hold that it fully complied with NEPA.

[22] Finally, plaintiffs assert that the Secretary's substantive decision to approve federal assistance to the developers of

the Ranch gave insufficient weight to the environmental risks inherent in constructing a city of 88,000 persons over an area supplying water to more than 1,000,000 residents. The environmental studies indicated that domestic sewage, solid waste, accidental spills of dangerous liquids and storm water run-off posed the greatest threats to the integrity of the aquifer. The district court summarized well the pervasive measures required by HUD to protect the water quality of the underground reservoir. It suffices to refer the interested reader to that cogent exposition with the observation that the precautions taken clearly supported the court's determination of their adequacy. Sierra Club v. Lynn, *supra*, 364 F.Supp. at 843.

Should it be discovered that pollutants have escaped the surface controls and threaten the aquifer, the developer must take remedial action, including installing an impervious lining in drainage channels over the 161 acres of land identified as especially porous. Any remedial action is subject to HUD and Texas Water Quality Board approval. The project agreement makes it the developer's legally enforceable duty to comply with all present and future environmental quality standards. The developer has agreed to undertake measures to minimize soil erosion and control of sediment and water run-off during the construction phases. To effectuate its duty of quality control and inspection of public improvement construction projects, the developer in conjunction with the City of San Antonio, the Texas Water Quality Board and the Texas State Department of Health has agreed to create an environmental committee, an architectural review board and to employ an independent inspection agent, whose reports will be available to all public and other regulatory agencies. We view the efforts expended to protect the aquifer as substantial and apparently efficacious. The Secretary's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

III.

Water Pollution Prevention and Control Act Amendments of 1972

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92–500, 86 Stat. 816, 33 U.S.C. § 1251 et seq., in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To this end the administrator of the Environmental Protection Agency is directed, in cooperation with other federal, state and local agencies, to "prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve . . . the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes." 33 U.S.C. § 1252(a). The Act provides for federal and state enforcement of effluent limitations to be prescribed and of a discharge permit system. 32 U.S.C. § 1319. Unless in compliance with the provisions of the Act, "the discharge of any pollutants by any person shall be unlawful." 33 U.S.C. § 1311.

The district court concluded that plaintiffs had failed to state a claim under the Water Pollution Control Act because (1) this record does not reflect that the Environmental Protection Agency had established any water quality standards for the court to enforce, and (2) the scheme of environmental controls imposed should prevent any Ranch polluted water from reaching the aquifer. In this court, arguing from the dual premises that the Act establishes a federal policy of nondegradation of the Nation's surface and ground water supplies and that either the Ranch or the "parasite" developments it will attract in adjacent areas will inevitably result in the degradation of the aquifer, plaintiffs contend that HUD's loan commitment violates the duty imposed on the agency by

33 U.S.C. § 1368(c). This section provides in pertinent part that "[i]n order to implement the purposes and policies of this chapter to protect and enhance the quality of the Nation's water, the President shall . . . cause to be issued an order (1) requiring each Federal agency authorized to enter into contracts and each Federal agency which is empowered to extend Federal assistance by way of grant, loan, or contract to effectuate the purpose and policy of this chapter in such contracting or assistance activities. . . ." In Executive Order No. 11738, 38 Fed.Reg. 161 (1973), the President subsequently mandated that "each Federal agency empowered to extend Federal assistance by way of grant, loan or contract shall undertake such procurement and assistance activities in a manner that will result in effective enforcement of the Clean Air Act and the Federal Water Pollution Control Act. . . ."

[23] In the absence of evidence that the Ranch will pollute the aquifer and degrade established standards of water quality or that HUD's loan commitment contravened its duty to effectuate the Federal Water Pollution Control Act, we affirm the district court's determination that plaintiffs have failed to state a claim for violation of that Act. As the court below stated, the record is silent as to standards of water quality for the aquifer prescribed by the Environmental Protection Agency. It is undisputed that the developer must meet any state or federal water standards that may be established in the future. More importantly, the developer must act to prevent the Ranch from degrading the existing water quality in the aquifer. If the Ranch is discovered to be polluting the underground water supply, the developer has the legally enforceable duty to remedy the situation.

IV.

Attorneys' Fees

Convinced that this litigation, instituted by the plaintiffs as "private attorney generals," had advanced the public interest

by ensuring that adequate precautions would be taken to protect the aquifer and by effectuating important congressional policy, the district court awarded plaintiffs 20,000 dollars in attorneys' fees, costs and expenses. Only the developers were cast in judgment for this award since HUD and Secretary Lynn were immunized by statute. *See* 28 U.S.C. § 2412. Plaintiffs appeal from the award as inadequate. The developer cross-appeals from the award as improperly assessed against it. We reverse on the cross-appeal.

"The so-called 'American Rule' governing the award of attorneys' fees in the federal courts is that 'attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.' Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967)." F. D. Rich Co., Inc. v. United States, Industrial Lumber Co., Inc., — U.S. —, —, 94 S.Ct. 2157, 2163, 40 L.Ed.2d 703 (1974). Plaintiffs recognize that neither NEPA nor Title VII provide for the recovery of attorneys' fees. They had no contractual agreement with HUD or the developer concerning attorneys' fees.

The "American Rule" has not served, however, as an absolute bar to the shifting of attorneys' fees even in the absence of statute or contract. The federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation. We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefitted class. The lower courts have also applied a rationale for fee shifting based on the premise that the expense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important public policies.

F. D. Rich Co., Inc. v. United States, Industrial Lumber Co., Inc., *supra*, — U.S. at —, 94 S.Ct. at 2165 (footnotes omitted).

The power to award attorneys' fees in the absence of statutory or contractual authorization is rooted in the inherent power of a federal court to do equity in the face of "overriding considerations." *See* Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). Clearly, no such considerations within the ambit of the first two exceptions to the American Rule exist in this case. It would be improper to punish the developer or HUD, either as unsuccessful litigants, or for bad faith, vexatious or obdurate conduct in their defense of the action. Inapplicable also is the "common fund" or "common benefit" exception, which is founded on the unjust enrichment rationale that the entire class benefited by a plaintiff's efforts should share the cost of litigation. It shifts to the beneficiaries those costs that they would have incurred had they brought and prosecuted the suit. *See* Hall v. Cole, *supra*; Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). None of the benefits of this litigation cited by the district court have inured, except in the abstract, to the developer. The common benefit rationale could justify an award against a public agency or private entity which would be able to shift the costs in common to the members of the public who draw their water from the Edwards Aquifer. Clearly, the developer is not in a position to distribute the costs of this litigation to the one million residents of the San Antonio area who will benefit from the preservation of this water source.

The present case is almost identical to The Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974), petition for cert. filed, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309 (1974). There the District of Columbia Circuit invoked the third exception to the American Rule to award attorneys' fees to plaintiff citizen groups who had acted as private attorney generals in litigation which, while not obtaining the ultimate

relief sought, did act as a catalyst to effect a change that served the public interest. The litigation had blocked construction of the Trans-Alaska Pipeline until Congress subsequently enacted specific legislation permitting construction. One-half of the plaintiffs' attorneys' fees were assessed against Alyeska Pipeline Service Co., the private applicant under the Mineral Leasing Act, despite the fact that it was the Interior Department which had violated the Act and failed to comply with NEPA. The court reasoned that since "Alyeska unquestionably was a major and real party at interest in this case, actively participating in the litigation along with the Government, we think it fair that it should bear part of the attorneys' fees." 495 F.2d at 1036 (citation omitted). The fees were arbitrarily halved and Alyeska was assessed one half. Since collection from the government was barred by statute, plaintiffs were required to absorb the other half. While Alyeska's participation in litigation that would have been finally adjudged improper but for congressional intervention might be cited as a distinguishing feature, the basic thrust of the majority position in the D. C. Circuit supports the action taken by the court below.

[24] We decline to follow *The Wilderness Society*. This circuit has never assessed attorneys' fees against a party innocent of any wrongdoing.[6] In the absence of proof that the private party controlled the government agency's actions or caused its default, it cannot be cast in judgment as a result of the agency's shortcomings. The fact that the breach of duty involved was committed by one who is immune from liability for financial redress affords no basis for a shifting of fees.

[25] It would be inequitable to assess attorneys' fees against the private developer in this case. Granting that plaintiffs performed a valuable public service in bringing this

6. Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); 493 F.2d 765 (5th Cir. 1974) and Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970), relied upon by the district court, are not to the contrary.

action which directly caused HUD's full compliance with NEPA on the Ranch project, it cannot be gainsaid that HUD was the only party that had breached a duty.[7] Congress directed the environmental obligations of NEPA against federal agencies alone. HUD was solely responsible for the initially deficient impact statement. The developer successfully defended this lawsuit. Its defense was not shown to have been unreasonable or to have unduly protracted this litigation. The district court was incorrect in proceeding from the premise that "attorneys' fees should be awarded unless the trial court can articulate specific reasons for a denial." 364 F.Supp. at 848.

The result of governmental immunity in this case is to require plaintiffs to absorb their own legal expenses. Another solution for future cases must come from Congress rather than in whole or half from the pocket of an innocent party.

V.

Retention of Jurisdiction

In entering judgment for the defendants, the district court retained jurisdiction over this action for the purpose of ensuring future compliance with the safeguards imposed on the Ranch's development; monitoring the development of areas adjacent to the Ranch and new measures which may be taken to protect the recharge zone; and acting as a central depository and public information source for all future written materials relating to compliance with HUD's requirements. The Texas Water Quality Board and the Edwards Underground Water District were ordered to file semi-annual reports on the extent and effect of development over the recharge zone and the measures instituted for protection of the aquifer, as well as the status of legislation, proposals and plans to protect remaining portions of the recharge zone outside Bexar Coun-

7. Because plaintiffs were unsuccessful in their other claims of statutory violations, only NEPA compliance is pertinent.

ty. 364 F.Supp. at 846. We find no constitutional basis to support this continued exercise of federal judicial power.

[26] Federal courts are empowered under Article III of the Constitution to rule only upon an actual "case or controversy." *See, e. g.*, Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937). With the rendition of a definitive judgment for defendants on the merits of each of plaintiffs' claims, affirmed by this court, the litigable aspects of the dispute are at an end unless further appellate proceedings are undertaken. The issues capable of judicial determination have been resolved; the rights and duties of the parties have been adjudicated.

[27, 28] The district court must abjure the role of a quasi-administrative agency for environmental affairs in Bexar and other affected counties. No evidence whatsoever indicates that HUD will fail to discharge faithfully its statutory functions. *See* SEC v. Medical Committee for Human Rights, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972). No analogy properly can be drawn here to civil rights or school cases in which the litigation proceeded against a background of a long history of purposefully unlawful conduct. *See, e. g.*, Alexander v. Holmes County Board of Education, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969). If any defendant should be asserted to be acting in breach of its duties under HUD's commitment or the law, the present plaintiffs or others who may be affected are free to file another action based upon such asserted malfeasance. Of course, the judgment and grant of relief disposing of the litigation, could have compelled the parties to file in a convenient local public office such reports as they may in the future make that contain material of public interest. The court may so modify its judgment upon remand.

[29] However, although "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case . . . ," United States v. Concentrated Export Assn., Inc., 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968), federal jurisdiction must be founded upon at least a "mere possibility [of recurrence] which serves to keep the case alive." United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). The record here discloses only the most speculative of possibilities that plaintiffs will find it necessary in the future to invoke judicial guidance of HUD's activities. As of today they can demonstrate no legal injury sufficient to present an actual case or controversy. *See* Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). There no longer remains any unadjudicated claim upon which relief can be granted. *See* Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973). "A hypothetical threat, based on speculative facts, is not enough to support the jurisdiction of a Federal Court." Alabama ex rel. Baxley v. Woody, 473 F.2d 10, 14 (5th Cir. 1973). In sum, we find on this record no jurisdiction to retain jurisdiction.

VI.

Conclusion

The judgment appealed from is affirmed except as to the award of attorneys' fees and the retention of jurisdiction. The cause is remanded for the entry of an order not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

ALYESKA PIPELINE SERVICE COMPANY,
Petitioner

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., AND FRIENDS OF THE EARTH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-1977

ALYESKA PIPELINE SERVICE COMPANY,
Petitioner

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., AND FRIENDS OF THE EARTH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 495 F.2d 1026 (1974) and will be referred to herein as "*Wilderness Society II*." The opinion of the court of appeals on the merits of the case is reported at 479 F.2d 842, *cert. denied*, 411 U.S. 917 (1973),

and will be referred to herein as "*Wilderness Society I*."

QUESTIONS PRESENTED

1. Whether, following its adjudication on the merits of the Trans-Alaska Pipeline controversy, the court below had the equitable power to authorize a partial shifting of fees from respondents to petitioner.

2. If so, whether the shifting of fees authorized by the court was an abuse of discretion when the record supports the conclusions that:

a. Respondents' successful litigation vindicated important Congressional policies and led to substantial benefits, including legislation imposing significant new environmental, technological and other safeguards; the litigation was necessary to achieve those ends; and the litigation, undertaken by respondents as private citizens for no economic gain, was massive and placed heavy burdens on respondents and their counsel; and

b. The Trans-Alaska Pipeline was conceived and proposed by petitioner; the litigation resulted from actions and decisions for which petitioner was responsible (and, in the case of the Mineral Leasing Act, from obligations that were directly enforceable against petitioner); the economic gain that petitioner hoped to derive from the pipeline made it the real party in interest in the litigation; petitioner took a major and active role in the litigation to protect its economic interests; petitioner received direct benefits from the litigation and can distribute the award among other beneficiaries; and the award does not otherwise work any hardship or unfairness on petitioner.

STATEMENT OF THE CASE

A. Introduction

Attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. This is the traditional American rule. Just last Term this Court reaffirmed the appropriateness of the rule in "everyday commercial litigation." *F. D. Rich Co.* v. *United States*, 417 U.S. 116, 130 (1974). The rule and its basic rationale were accepted by the court below.[1] Neither is being challenged in this case.

What is in issue is the application to the facts of this case of an equitable power that is as "traditional" and "historic" as the American rule itself. It is the power of federal courts to award attorneys' fees "in exceptional cases and for dominating reasons of justice." *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 167 (1939).[2] When reviewing awards of fees

[1] The decision below was prefaced by an acknowledgement that: "[T]he American rule barring attorneys' fees to successful litigants except in extraordinary circumstances is based on important policies of its own. But if the matter is examined closely . . . . an award of fees in the present case may be justified by reference to the very same policies." *Wilderness Society II*, 495 F.2d at 1031.

[2] As the Court noted in *Sprague*, the power of federal courts to award fees derives from "the original authority of the chancellor to do equity in a particular situation." 307 U.S. at 166. *See* cases and authorities cited at 307 U.S. 164 n.1, 165 n.2. *See generally* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. Pa. L. Rev. 636, 645 (1974); Goodhart, *Costs*, 38 Yale L. J. 849, 854 (1929); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 Minn. L. Rev. 619,

by lower federal courts, this Court has been concerned primarily with whether the fee award in a particular case was beyond the power of the lower court.[3] Once satisfied on this point, the Court has traditionally recognized that the court with detailed knowledge of the case is usually in a better position to make the "ultimate judgment . . . as to the fairness of making an award, or the extent of such an award." *Sprague*, 307 U.S. at 167.[4]

619-20 (1931); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. Colo. L. Rev. 202, 204-05 (1966); Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. Rev. 301, 313-14 (1973).

[3] *See, e.g., Hall* v. *Cole*, 412 U.S. 1, 4-14 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389-397 (1970); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 714-15 (1967); *Sprague*, *supra*, 307 U.S. at 164; *Trustees* v. *Greenough*, 105 U.S. 527, 537 (1882).

[4] *See, e.g., Hall* v. *Cole*, 412 U.S. at 14-15 (standard of review is whether "the award of counsel fees to respondent under the facts of this case constituted an abuse of the district court's discretion"); *Trustees* v. *Greenough*, 105 U.S. at 537 (the court below should have "considerable latitude . . . since it has far better means of knowing what is just and reasonable").

As Circuit Judge Walter Sanborn stated many years ago in a case reviewing the amount of an attorneys' fee award:

> "The judge who entered this decree below was familiar with the proceedings in his own court, with the character of this litigation, with the controversies, if any, that had arisen in it, with the amount of services that had been rendered by each of the solicitors, and with every step that had been taken in the case . . . . Its finding and decree thereon . . . must be taken as presumptively correct; and, unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand." *Farmers' Loan & Trust Co.* v. *McClure*, 78 F. 209, 210 (8th Cir. 1897).

The decision below rests on a judgment by the court that adjudicated the Trans-Alaska Pipeline controversy (1) that overriding equitable factors were present in the case that support a shifting of fees *from* respondents and (2) that, in the circumstances of the case, it was fair and equitable to shift a portion of those fees *to* the Alyeska Pipeline Service Company ("Alyeska"). Respondents respectfully suggest that an understanding of the record on which the court's judgment rests requires a fuller factual statement than that set forth in Petitioner's Brief ("P. Br.").

B. Statement of Facts

1. Identification of the Parties

Petitioner, Alyeska Pipeline Service Company, is owned by a consortium consisting of Exxon Pipeline Company, Mobil Pipeline Company, ARCO Pipeline Company, Phillips Petroleum Company, Union Oil Company of California, Sohio Pipeline Company, and Amerada-Hess Corporation. Those companies, or their beneficial owners, hold the rights to explore and develop the substantial oil and natural gas resources in Prudhoe Bay on the North Slope of Alaska. Alyeska was formed to construct and operate the Trans-Alaska Pipeline System—the system Alyeska's principals have chosen to transport oil from Prudhoe Bay to markets in the lower 48 states.

Respondents, The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth,

are non-profit organizations. Each of the organizations has had a long-standing concern for the Alaskan environment and a commitment to preserve it for present and future generations.

2. Description of the Trans-Alaska Pipeline System

The Trans-Alaska Pipeline System has come to be recognized as the "most complex" and "most ecologically sensitive" private engineering project ever attempted.[5] The overland portion of Trans-Alaska Pipeline System will traverse the State of Alaska from Prudhoe Bay on Alaska's North Slope to the Port of Valdez on Prince William Sound in the south —a distance of some 800 miles (641 of which cross federal public lands). From Valdez the oil will be loaded onto tankers to be transported through Prince William Sound and down the Northeast Pacific.

At Appendices A and B, respectively, respondents have reproduced from their papers below a description of the Trans-Alaska Pipeline System and a compilation of some of its still-unknown environmental

[5] Statement of Under Secretary of the Interior, William T. Pecora, contained in record below at P. Docs. III, Tab B, at 4 (R. 207).

Documents in the record below will be cited either as "Ad. Rec.," which refers to the documents collected by Interior Department lawyers and designated by them as the "Administrative Record" (R. 239); "FIS," which refers to the Interior Department's Final Impact Statement on the project (R. 239); and "Rule 9(h) Documents" and "P. Docs.," which refer to compilations of documents introduced into the record by respondents in the proceedings below (R. 152, R. 207).

ramifications.[6] Both Appendices are based entirely on statements contained in the Interior Department's Final Impact Statement. They will, hopefully, place the litigation in context by conveying some understanding of the environmental and technological problems posed by the Trans-Alaska Pipeline. For, as Russell E. Train has observed:

> "[T]he case of the Alaska pipeline has not been simply one of aesthetics, or of concern over wildlife and wilderness disturbance, or worries over water pollution, important as all of these are. It was clearly an example where sound environmental analysis was essential to sound engineering." [7]

3. Chronological Summary of the Litigation Below

a. *Events Preceding the Commencement of Litigation*

In August 1968, substantial oil and gas reserves were discovered on the Alaskan North Slope. In

[6] Appendix A is taken verbatim from pages 3-12 of Respondents' *Brief on National Environmental Policy Act Issues* (R. 206).

Appendix B, is taken verbatim from Appendix B of the Appendices to Respondents' *Brief on National Environmental Policy Act Issues* (R. 207).

[7] Address by the Honorable Russell E. Train to the Joint Judicial Conference of the Eighth and Tenth Circuits, June 29, 1973, quoted at *Wilderness Society II*, 495 F.2d at 1033 n.3.

Mr. Train (who is now Administrator of the Environmental Protection Agency) was Under Secretary of the Interior and Chairman of the Federal Task Force on Alaskan Oil Development when Alyeska's principals first submitted their proposal.

June 1969, the interested oil companies, Alyeska's principals, filed with the Interior Department a formal application for an oil pipeline right-of-way across the public lands of Alaska.[8] Alyeska's principals recognized from the outset that the right-of-way allowed by statute was not adequate for the pipeline they proposed:

> "*The 54' R.O.W.* [*right-of-way*] *which is allowed by statute is not adequate for the construction of a 48" pipeline. The R.O.W. should be 100' width* to accommodate the extremely large equipment that is necessary to handle the 48" pipe, and the large *spoil* [*from*] *excavated soil* . . . ." (Emphasis added).[9]

And supplemental papers filed by them at the time contained only generalized descriptions about how they proposed to construct the pipeline.[10] Nonetheless, they requested right-of-way permits "by July" so that construction-related activities could begin immediately.[11]

The permit application was referred to a Federal Task Force, which, on September 15, 1969, issued a report which concluded that the oil companies

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[8] Ad. Rec. 1.1.1.2 (R. 239).

[9] Letter from Kenneth P. Fountain, attorney for the Trans-Alaska Pipeline System to the Honorable Russell E. Train (then Under Secretary of the Interior), June 10, 1969, Rule 9(h) Documents, Tab B, p. 102 (R. 152) (Jt. App. 46).

[10] *See, e.g., Trans-Alaska Pipeline System's Answers to Questions*, June 19, 1969, P. Docs. I, Tab F; Ad. Rec. 1.1.2.1 (R. 207, R. 239).

[11] Letter from Kenneth P. Fountain, *supra*, Rule 9(h) Documents Tab B, p. 101 (R. 152) (Jt. App. 43).

"had not adequately finalized their own plans on a technological level" and were not in a position even to "use data from their own ongoing studies."[12] The report also concluded that a "complex and interrelated scope of environmental, technological, social and legal problems" remained to be solved.[13] Included among the legal problems identified in the report was the absence of statutory authority for the right-of-way requested.[14]

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[12] *Preliminary Report to the President*, Federal Task Force on Alaskan Oil Development, September 15, 1969, Rule 9(h) Documents, Tab C, p. 3; Ad. Rec. 1.1.2.1 (R. 152, R. 239) (Jt. App. 81).

[13] *Id.* at 5 (Jt. App. 82). The environmental problems identified in the report related to permafrost, seismic activity, water pollution (both with regard to the overland portion and in the operation of tankers on the marine leg of the system), and impacts on fish and wildlife.

[14] The report contained the following:

> "*Width of the right-of-way*: The application requests a 54-foot wide pipeline right-of-way together with an additional parallel and adjacent 46-foot right-of-way. Further, for all sections between Livengood and the North Slope, the applicants request another 100-foot right-of-way for a construction road, making a total requirement of 200 feet in width for that distance.
>
> "The authorizing statute (30 U.S.C. 185) limits pipeline rights-of-way to 25 feet on either side of center line, or to a total of 54 feet. Discussions are continuing between the Department and TAPS to determine the exact method by which TAPS will acquire the additional 46 feet for the pipeline right-of-way and the further addition of a 100-foot right-of-way for a construction road." *Id.* at 11 (Jt. App. 86).

Throughout the remainder of 1969, and the early months of 1970, Alyeska's principals pressed for the commencement of the pipeline-related construction.[13] Their efforts were successful in part when, in March 1970—at a time when the "complex and interrelated . . . environmental, technological, social and legal problems" referred to by the Task Force remained largely unsolved and barely two months after the enactment of the National Environmental Policy Act—Secretary Hickel announced that the first stage of pipeline-related construction, a haul road for the pipeline from the Yukon River to the North Slope, was about to begin.[14] That authorization was recognized within the Interior Department as approval of the pipeline itself.[15] On March 20, 1970, to "fulfill the requirements of Section 102(2)(c) of the National Environmental Quality [sic] Act of 1969," a cursory seven-page document titled "*Environmental Statement: Yukon River-North Slope Road*" was forwarded to the Council on Environmental Quality.[16]

[13] *See, e.g.*, Department of the Interior News Release, January 14, 1970, P. Docs. I, Tab I (R. 207).

[14] Letter from Secretary Hickel to President Nixon, March 5, 1970, P. Docs. I, Tab K (R. 207).

[15] Memorandum for the Record of North Slope Task Force Working Group Meeting, June 17, June 18, 1969, P. Docs. I Tab K ("once we sanction any part of the road right-of-way we are actually approving the pipeline and furthermore render it difficult or impossible to make major route changes . . . .") (R. 207).

[16] P. Docs. I, Tab K (R. 207).

b. *Commencement of the Litigation and Issuance of an Injunction*

The decision to proceed with the project in this manner led respondents to seek the assistance of counsel. Recognizing that a major, ongoing legal effort would be required which they could not themselves afford and which, whatever its outcome, would result in no award of monetary damages, respondents obtained the assistance of attorneys from the Center for Law and Social Policy. The Center is modelled along the lines of such organizations as the NAACP Legal Defense and Educational Rund. Its attorneys provide legal representation in poverty law, consumer, environmental, and other areas to groups and individuals who, for economic reasons, cannot obtain legal representation from traditional law firms.[17]

On March 26, 1970, respondents filed a complaint against the Secretary of the Interior (R. 1A) and a Motion for Preliminary Injunction, together with extensive affidavits from zoologists, biologists, ornithologists, geologists, seismologists, botanists, and pipeline engineers (R. 3A). On April 23, 1970, the district court held that irreparable injury was likely to result from the commencement of the construction-related activities in question and granted respondents' Motion for Preliminary Injunction (R. 26). The injunction was premised on two grounds: (1) that the application of Alyeska's principals exceeded the limitations that Congress had established in Section 28

[17] As the litigation progressed, additional legal assistance was provided by attorneys on the staffs of the Environmental Defense Fund and the Natural Resources Defense Council.

of the Mineral Leasing Act of 1920 (30 U.S.C. § 185) on the amount of public lands that could be diverted to pipeline use; and (2) that the environmental and other safeguards set forth in the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq.*) had not been applied to the project. *Wilderness Society* v. *Hickel*, 325 F. Supp. 422 (D.D.C. 1970).

c. *Events Preceding the Court of Appeals' Decision on the Merits*

On January 15, 1971, almost a year after the issuance of the preliminary injunction, the Interior Department published a "Draft Impact Statement" on the proposed pipeline. Ad. Rec. 2.13 (R. 239).[20] Discovery disclosed that before publication drafts of the statement were given to Alyeska and substantial revisions were made at Alyeska's behest to delete or soften numerous negative observations about

[20] In the interim, respondents had undertaken an extensive discovery effort in the district court. *See, e.g., Interrogatories of Plaintiff* [hereinafter referred to as "Respondents"] *to Defendant*, May 20, 1970 (R. 27); *Interrogatories of Respondents to Defendant*, June 12, 1970 (R. 31); *Request of Respondents for Defendant To Produce for Inspection Certain Documents*, July 20, 1970 (R. 36); *Motion of Respondents To Compel Answers to Interrogatories*, July 24, 1970 (R. 37); *Request of Respondents for Admissions Pursuant to Rule 36*, August 20, 1970 (R. 43); *Request of Respondents for Production of Documents*, September 30, 1970 (R. 46); *Motion of Respondents To Compel Answers t Interrogatories and Inspection of Documents*, November 10, 1970 (R. 52); *Supplemental Memorandum of Respondents in Support of Their Motion to Compel Answers to Interrogatories and Inspection of Documents*, December 8, 1970 (R. 56); *Interrogatories to Defendant as Amended*, February 22, 1971 (R. 60).

the proposal.[21] At substantial cost and effort, respondents arranged for expert witnesses in a broad range of technological, environmental, and other disciplines to appear at public hearings and describe the major defects that remained in the Alyeksa proposal.[22]

[21] *See* Deposition of Deputy Under Secretary of the Interior Jack O. Horton at 101-02, 111-12, 116 and Exhibits A-E thereto (R. 217). *See also* documents collected at P. Docs. II, Tab B (R. 207).

[22] A summary of *Public Comments on the January Statement* was submitted to the court below as Appendix C in Respondents' *Appendices to Brief on National Environmental Policy Act Issues* (R. 207).

Respondents were not alone in their criticism. Almost every federal agency with expertise in environmental matters commented critically on Alyeska's lack of readiness in a broad range of areas. A summary of *Agency Comments on the January Statement* was submitted to the court below as Appendix D in Respondents' *Appendices to Brief on National Environmental Policy Act Issues* (R. 207). The following comments are illustrative:

> *Pipeline Engineering*—"The draft environmental statement is seriously weakened by the lack of technical design details. These details are unavailable from the permit applicant because he has not yet developed the final pipeline, monitoring systems and related designs. The weakness results in broad assurances that environmental degradation will be kept to a minimum . . . ." (Letter from EPA Administrator Ruckelshaus to Secretary Morton, March 12, 1971, p. 3, ¶ 3) (FIS, Vol. 6, p. A-43; Ad. Rec. 2.14.6.3.1) (R. 239).
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> *Seismological Problems*—"The statement discusses some of the potential problems related to seismic activity but the references to the seismology problems are

It was only after these hearings that efforts were begun to evaluate realistically the full range of technological and environmental problems posed by the Trans-Alaska Pipeline and to devise ways to re-

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incomplete. An appropriate evaluation would require a full report detailing the earthquake . . . risks . . . . [I]t is recommended that detailed studies be made for the diverse earthquake problems related to the pipeline. This would involve the field of engineering seismology and the application of strong motion data . . . . This is essential in view of the variance in surface geology which will support the pipeline structures." (Comments of Office of Assistant Secretary of Commerce for Environmental Affairs, April 16, 1971, pp. 10-11) (FIS, Vol. 6, p. A-78; Ad. Rec. 2.14.6.3.1) (R. 239).

* * * *

Detection of Terrestrial Oil Spills and Leaks—"The seismic and leak monitoring systems are to provide the basic alert mechanism to protect the environment against major crude oil releases. Yet, according to the draft statement these systems have not been designed. Therefore, it is not possible to determine their efficiency and dependability." (Letter from EPA Administrator Ruckelshaus to Secretary Morton, March 12, 1971, p. 4, ¶ 5) (FIS, Vol. 6, p. A-44; Ad. Rec. 2.14.6.3.1) (R. 239).

* * * *

Monitoring Systems—"The monitoring of the system will be critical to its safe operation and to the avoidance of leaks and spills. Much additional data is required on precisely how the monitoring will function, before it will be possible to make a judgment on the safety and integrity of the system." (Comments by the Department of Transportation, March 24, 1971, p. 1) (FIS, Vol. 6, p. A-55; Ad. Rec. 2.14.6.3.1) (R. 239).

* * * *

Marine Transport—"In particular, we feel that the transshipment of oil from the Port of Valdez to other

duce the substantial risks that remained both to the physical integrity of the pipeline and to the surrounding environment. Alyeska finally began compiling a comprehensive Project Description,[23] and a completely new environmental impact statement drafting team was organized by the Interior Department.[24]

Following the submission of its Project Description to the Interior Department in July and August 1971, Alyeska sought leave to enter the litigation as a party defendant. In papers filed in district court on August 20, 1971, Alyeska asserted that:

> "[I]t is Alyeska and its shareholders, and not the Plaintiffs or Defendant [*i.e.*, the Secretary

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coastal points in the continental United States to be as serious a concern and responsibility of the Federal Government in terms of probable adverse environmental impact as anything occurring in the State of Alaska itself. The statement should carefully and accurately evaluate the risk of massive oil-spills, in international waters proximate to Canada, along the northwest coast of the United States, and in the Puget Sound area of Washington State, in considering whether to approve or disapprove the Alyeska proposal, and in deciding whether lesser risks may occur by recourse to other means of transporting oil from the Prudhoe Bay oilfields." (Letter from Secretary of HEW to Secretary Morton, July 6, 1971, p. 4) (FIS, Vol. 6, p. A-103; Ad. Rec. 2.14.6.3.1) (R. 239).

[23] Deposition of Dr. Frederick Sanger, Chairman of the Interior Department's Technical Advisory Board, at 8 (R. 221).

[24] Deposition of Dr. David A. Brew, Chairman of the Interior Department's Environmental Impact Statement team, at 7, 88-89 (R. 220).

> of the Interior] which have the 'real economic stake in the outcome of this litigation' . . . ." [25]
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> "[Alyeska's] interests cannot be represented adequately by existing parties; the responsibilities and duties of the Secretary of Interior, do not include or concern the proprietary and financial interests of Alyeska or the companies with whom Alyeska has contracted and for whom it is authorized to act as agent and attorney-in-fact in connection with the applications which are the subject of this action." [26]

Those interests were so strong, Alyeska asserted, that:

> "Alyeska as a private party may well have a greater interest than the Secretary of the Interior in advancing arguments in support of the Secretary's authority to issue the necessary rights-of-way and permits." [27]

Alyeska's motion was granted on September 20, 1971 (R. 84) without opposition from respondents (R. 79).[28] Once in the litigation, Alyeska pursued its interests vigorously.[29]

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[25] *Memorandum of Points and Authorities in Support of Alyeska Pipeline Service Company's Motion to Intervene*, pp. 7-8 (R. 77).

[26] *Motion of Alyeska Pipeline Service Company To Intervene as a Defendant*, p. 4 (R. 77).

[27] *Memorandum, supra*, note 25, at 11-12 (R. 77).

[28] On September 10, 1971, the State of Alaska was also allowed to intervene as a party defendant (R. 83), again without opposition from respondents (R. 81).

[29] The 78 docket entries between the date of Alyeska's intervention (September 20, 1971) and the filing of respondents' *Motion for Partial Summary Judgment* on May 12, 1972 (R. 152) belie the assertion in Alyeska's brief (P. Br. 5) that "proceedings in the district court . . . [were] essentially dormant" following its intervention. Alyeska participated extensively in a broad range of procedural matters during this period. *See, e.g., Memorandum of Points and Authorities Submitted by Defendant Alyeska Pipeline Service Company in Support of Defendant's Motion To Have the Action Maintained as a Class Action*, November 23, 1971 (R. 106); *Memorandum of Alyeska Pipeline Service Company in Opposition to the Motion by David Anderson and the Canadian Wildlife Federation To Intervene*, November 30, 1971 (R. 111); *Memorandum of Alyeska Pipeline Service Company in Opposition to Respondents' Motion To Clarify the Preliminary Injunction*, December 1, 1971 (R. 114); *Response of Alyeska Pipeline Service Company to Motion for Protective Order*, December 13, 1971 (R. 127); *Memorandum of Alyeska Pipeline Service Company in Opposition to Respondents' Motion To Compel Production of Documents*, February 18, 1972 (R. 140).

On March 20, 1972, the Interior Department released to the public a six-volume Environmental Impact Statement and a three-volume Economic and Security Analysis. Ad. Rec. 2.14 (R. 239). In response to the Secretary's announcement that he would withhold decision for 45 days to permit public comment, respondents disseminated the impact statement to a large number of experts across the country and submitted their comments to the Secretary on May 4, 1972.[30]

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[30] The comments submitted by respondents were organized in four volumes relating to Technical Comments (I), Terrestrial Impact (II), Marine Impact (III), and Economics, National Security and Systematic Evaluation and Balancing of Alternatives (IV). *See* Ad. Rec. 4.3.2.1 (R. 239).

On May 11, 1972, the Secretary announced through a News Release that Alyeska would be granted the permits it requested for the Trans-Alaska Pipeline.[31] The Secretary indicated that a dual permit device would be utilized to accommodate Alyeska's land needs. That is, permits designated "right of way" permits would be issued for the first fifty feet required by Alyeska and permits designated "special land use permits" would be issued for whatever additional contiguous lands Alyeska might need.

On May 12, 1972, respondents filed a Motion for Partial Summary Judgment on the Mineral Leasing Act issues in the case (R. 152). In their accompanying brief, respondents contended that Congress enacted the Mineral Leasing Act as a conservation measure; that its width limitation was designed to assure that if more land was needed for larger pipelines Congress would have the opportunity to consider whether and under what conditions such land might be used; and that the contemplated dual permit device violated both the Mineral Leasing Act and the Interior Department's own regulations. Respondents contended further that the Mineral Leasing Act presented a threshold legal issue, the adjudication of which could be dispositive of the case.[32]

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[31] The release is contained at Tab A of Respondents' *Appendices to Brief on the Mineral Leasing Act Issues* (R. 152).

[32] *See, e.g.*, Respondents' *Motion for Partial Summary Judgment*, May 12, 1972, at 1 (R. 152) (Jt. App. 139):

> "The grounds for [respondents'] motion are that the Mineral Leasing Act issues present threshold questions resting on operative facts that are different from and independent of the operative facts of [respondents'] claims under the National Environmental Policy Act ("NEPA"); the NEPA issues need be adjudicated only if the permits contemplated by the Secretary are not prohibited by the Mineral Leasing Act; and if said permits are prohibited by the Mineral Leasing Act; it would be a waste of judicial time and effort for [the] court to adjudicate the far more complicated NEPA issues which would, in that event, be reduced to hypothetical questions."

Respondents suggested, therefore, that the Mineral Leasing Act issues be decided without further delay.[33]

Alyeska vigorously opposed respondents' Motion. Alyeska argued in part that a full presentation of the Natural Environmental Policy Act ("NEPA") issues in the case was necessary to provide a factual predicate for an informed judgment on the Mineral

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[33] Respondents' *Response to Defendant's Motion To Defer Consideration of Respondents' Motion for Partial Summary Judgment Under the Mineral Leasing Act*, May 19, 1973, at 2 (R. 162) (Jt. App. 160-61):

> "The oil companies have had three full years to figure out why the Mineral Leasing Act does not mean 50 feet when it says 50 feet. Surely, they—and the Secretary—should now be required to provide their explanations . . . .
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> "[Respondents] suggest, therefore, that defendants be required to file responsive briefs to [respondents'] Motion for Pretrial Summary Judgment within ten (10) days (they have already had the motion for seven days); followed by an expeditious consideration by the Court of the merits of [respondents'] motion. If the Court concludes that [respondents'] contentions are clearly correct—as it preliminarily concluded in April, 1970—if can then afford defendants the opportunity of an expedited appeal (which defendants could make either to the Court of Appeals or as may be far more appropriate, and likely, to Congress)."

Leasing Act issues. Alyeska argued further that such a presentation would lead to the rejection of respondents' Mineral Leasing Act arguments:

> "Both the permit issues and those relating to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 *et seq.*, are inseparably associated with the technical details of how the trans-Alaska pipeline system will be built. Alyeska is confident that when the [respondents'] contentions are examined by this Court with a full factual understanding of the project, the scope of the Secretary's power to issue the requested permits and the past policies and practice of the Department of the Interior, the Court will reject those contentions." [34]

Alyeska prevailed in its position (R. 164). Respondents' motion was held in abeyance while discovery on the NEPA issues (which had theretofore been deferred at the request of Alyeska and the other defendants) was completed on an expedited basis.[35]

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[34] *Memorandum of Alyeska Pipeline Service Company in Support of Defendant's Motion To Place Respondents' Motion for Partial Summary Judgment in Abeyance*, May 17, 1972, at 7-8 (R. 154) (Jt. App. 147-48).

[35] Depositions were taken on May 18, 1972 (R. 217), May 24, 1972 (R. 220), May 31, 1972 (R. 221), June 6, 1972 (R. 222), June 8, 1972 (R. 223), June 16, 1972 (R. 224), and June 24, 1972 (R. 225). In addition, on May 26, 1972, Alyeska served on respondents extensive interrogatories designed to explore the adequacy of respondents' standing under *Sierra Club* v. *Morton*, 405 U.S. 727 (1972) (R. 165). The response to these interrogatories, which required information from respondents' officers and members across the country, was filed by respondents on June 26, 1972 (R. 194, R. 195).

The exposition of the NEPA issues in the case required an elaborate development of the technical details of the Trans-Alaska pipeline. Respondents dealt extensively with those details in their NEPA brief.[36] So did Alyeska, which filed extensive briefs which, when printed, filled over 300 pages (more than the combined totals of the other defendants) (R. 205, R. 230). The result was a record and set of briefs that set forth the entire fact picture that Alyeska had contended was necessary for a fully informed decision in the case.

On August 14 and 15, 1972, the district court heard argument in the case. Alyeska was allocated

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[36] See Respondents' *Brief on National Environmental Policy Act Issues*, at 3-12, 54-59, 72-80 (R. 206). (Page references are to the printed version of the brief, filed on September 13, 1972, in the court of appeals.)

The principal NEPA issues raised by respondents were: *First*, that by focusing on Alyeska's proposal for North Slope oil, and effectively excluding from consideration a second (gas) pipeline which the Interior Department acknowledged would be constructed across Canada in any event, the impact statement did not set forth the full implications of the Alyeska proposal or analyze the realistic alternatives to it. These alternatives were (1) an oil and gas pipeline across Alaska *plus* marine transport of oil through Prince William Sound and down the Northeast Pacific *plus* a completely separate pipeline route for North Slope natural gas across Canada or (2) a single overland corridor across Canada which could accommodate both the oil and gas pipelines. *Id.* at 39-64. *See* Appendix A, *infra*. *Second*, that in view of the substantial number of indeterminacies acknowledged in the impact statement, the statement should also have indicated the steps, if any, being taken to close those gaps and discuss the risk of proceeding in the face of so many indeterminacies. *Id.* at 65-86. *See* Appendix B, *infra*.

the major portion of defendants' time on both the Mineral Leasing Act and NEPA issues. On August 15, 1972, the district court ruled from the bench in defendants' favor. The court declined, however, to set forth reasons for its decision on the grounds that it would take "weeks and months to complete" an "exhaustive, legal opinion" and that "the appellate process [should] be initiated as soon as possible." [37]

4. The Court of Appeals' Decision on the Merits

An expedited appeal to the court of appeals ensued. Oral argument was held on October 6, 1972, with Alyeska again allocated the main portion of defendants' argument. Since no opinion had been issued below, it was necessary for the court of appeals to conduct its own five-month review of the voluminous record. On February 9, 1973, the court rendered its exhaustive opinion in *Wilderness Society I*.

The focus of the court's opinion was on the Mineral Leasing Act. The court concluded that, on its face, Section 28 of the Mineral Leasing Act precluded issuance of the right-of-way permits requested

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[37] *See Wilderness Society* v. *Morton*, 4 ERC 1467 (D.D.C. 1972).

At the conclusion of the two-day oral argument, the district court remarked:

> "I have never seen a case more thoroughly or better briefed on all sides. I can hardly imagine that anyone of you could brief it more extensively or better." Transcript, *Hearings before District Court*, August 15, 1972, at 360.

by Alyeska. *Wilderness Society I*, 479 F.d at 855.[38] The opinion demonstrated further that the width limitation contained in Section 28 was a device consciously chosen by Congress to "maintain control over pipeline rights-of-way and to force the *industry* to come back to Congress if the amount of land granted was insufficient for its purposes." *Id.* at 892. (Emphasis added).

As explained in the opinion, the Mineral Leasing Act was the product of a debate on public land use

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[38] The full text of Section 28 of the Mineral Leasing Act is set forth at P. Br., App. A. The section provided in pertinent part that:

> *"Rights of way through the public lands . . . may be granted by the Secretary of the Interior* for pipe-line purposes for the transportation of oil or natural gas . . . *to the extent of the ground occupied by the said pipe line and twenty-five feet on each side* of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior . . . ." (Emphasis added).

The section also provided:

> "That *no right-of-way shall hereafter be granted* over said lands for the transportation of oil or natural gas *except under and subject to the provisions, limitations and conditions of this section.*" (Emphasis added).

And the section contained a specific forfeiture provision in the event of any "failure to comply with the provisions of this section":

> *"Failure to comply with the provisions of this section* or the regulations and conditions prescribed by the Secretary of the Interior *shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding."* (Emphasis added).

extending over several Congresses. It was triggered by Congress' concern that "in the past, when granting rights-of-way to railroads, it had been much too generous in giving away valuable public lands, and it did not want this to be repeated." *Wilderness Society I*, 479 F.2d at 863. Over the years preceding the Act's passage, Congress considered various width limitations for oil and gas pipelines. *Id.* at 856. Congress was warned by oil and gas pipeline proponents that a fifty-foot width limitation would not accommodate future pipeline developments. *Id.* at 859. Nonetheless, Congress selected that width limitation because it was sufficient for pipeline construction methods with which it was familiar. *Id.* at 863 n. 47. If interested oil companies needed more land, Congress intended for them to "come back and try to get a more liberal law." *Ibid.*

In light of the above, the court concluded that:

> "Article 4, § 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory [or] other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations." *Id.* at 891.
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> "*These companies* have now come into court, accompanied by the executive agency authorized to administer the statute, and have said, 'This is not enough land; give us more.' We have no more power to grant *their request*, of course, than we have the power to increase congressional appropriations to needy recipients." *Ibid.* (Emphasis added).

With regard to the National Environmental Policy Act issues in the case, the court concluded that the parties had presented "complex and important questions." *Id.* at 889. Those questions, the court was later to say, were interrelated with the Mineral Leasing Act issues and had served as a predicate for a "precise analysis" of those issues. *Wilderness Society II*, 495 F.2d at 1035. But the necessity for prior Congressional action could moot, or developments pending Congressional action could alter, the factors bearing on a final resolution of the NEPA issues. *Wilderness Society I*, 479 F.2d at 889. Thus, although three dissenting judges would have reached the NEPA issues, the court declined to adjudicate them on tra-

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[39] It should be noted that in *Wilderness Society I* the court of appeals squarely rejected Alyeska's assertions that its decision to seek authorization from the Secretary rather than the Congress was supported by Interior Department "special land use permit" regulations and certain opinions of the Attorney General (P. Br. at 16 n. 11). The court there held that on their face the Department's "special land use permit" regulations and the Attorney General's opinions cited by petitioner precluded the type of permit Alyeska requested. *Id.* at 870-75.

The court also pointedly noted the irony that Alyeska "apparently did not know" about the so-called "administrative practice of over fifty years" (P. Br. at 30 n. 25) at the time Alyeska filed its application with the Secretary. 479 F.2d at 867. Indeed, a subsequent three-year search by Alyeska and Interior Department counsel into the files of Interior Department field offices in quest of such a practice produced no more than a handful of documented instances to which the court of appeals properly gave little weight in *Wilderness Society I*, 479 F.2d at 868.

ditional ripeness grounds, *id.* at 889-90, citing *Poe v. Ullman*, 367 U.S. 497 (1961) and 367 U.S. at 528 (Mr. Justice Harlan, dissenting).

Petitions for certiorari were filed on March 9, 1973, and respondents' opposition was filed on March 28. Five days later, on April 2, 1973, this Court denied certiorari, without dissent. 411 U.S. 917 (1973).

5. Public Law No. 93-153, 87 Stat. 576 [40]

With its jurisdiction over the public lands preserved, Congress embarked upon several months of intensive deliberations—filling thousands of pages of hearings [41] and reports.[42]

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[40] 30 U.S.C.A. § 185 (Supp. 1974); 43 U.S.C.A. § 1651 *et seq.* (Supp. 1974).

[41] *See, e.g., Hearings on S. 1040, S. 1041, S. 1056, S. 1081 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 1 (1973); *Hearings on S. 1040, S. 1041, S. 1056, S. 1081 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 2 (1973); *Hearings on S. 970, S. 993, S. 1565 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 3 (1973); *Hearings on S. 970, S. 993, S. 1565 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 4 (1973); *Hearings on H.R. 9130 Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 93rd Cong., 1st Sess., Ser. No. 93-12, pt. 1 (1973); *Hearings on H.R. 9130 Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., Ser. No. 93-12, pt. 2 (1973); and *Hearings on H.R. 9130 Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., Ser. No. 93-12, pt. 3 (1973).

[42] *See, e.g.*, S. Rep. No. 93-207, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 93-414, 93d Cong., 1st Sess. (1973); H.R. Rep. No 93-420, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 93-617, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 93-624, 93d Cong., 1st Sess. (1973).

That process convinced Congress that (1) it should enact a completely new legislative charter for pipelines crossing the public lands, incorporating stringent technological, environmental, and land use safeguards, and (2) that the construction of the Trans-Alaska Pipeline should proceed, subject to extensive safeguards set forth in the Act, without further litigation under the National Environmental Policy Act.[43]

With regard to Congress' decision to authorize the construction of the Trans-Alaska Pipeline, a proposal to declare that the actions already taken by the Secretary constituted compliance with NEPA was rejected.[44] But by a 49-49 vote in the Senate, requiring then Vice President Agnew to break the tie, and a 221-198 vote in the House, Congress nonetheless decided to permit construction of the pipeline without any further litigation under NEPA.[45]

The extensive hearings and debate had convinced Congress that during the forced delay of pipeline construction:

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[43] The text of Pub. L. No. 93-153 is set forth at Appendix C to this brief. The provisions of the Act are summarized at pp. 51-54 *infra*.

[44] H.R. Rep. No. 93-617, 93d Cong., 1st Sess. 27 (1973). Alyeska's assertion that Congress made "a legislative finding that the Department's efforts were fully adequate" (P. Br. 35) is in error.

[45] 119 Cong., Rec. S. 13,689-90 (daily ed. July 17, 1973); 119 Cong. Rec. H. 7281-82 (daily ed. Aug. 2, 1973).

> "[T]he risk of environmental damage . . . has been substantially lessened as a result of the stricter environmental stipulations, redundant safety systems, contingency planning and better engineering imposed upon the proposed Trans-Alaska pipeline." [46]

In language that mirrored *Wilderness Society I*, Congress determined that:

> "It is fitting and proper for Congress to make this decision. The issue is one of national importance. The issue involves the use of the public lands, the control of which the Constitution expressly reserves to Congress. It is the responsibility of Congress to decide whether the pipeline should be authorized." [47]

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[46] S. Rep. No. 93-207, 93d Cong., 1st Sess. 18 (1973).

These benefits were acknowledged by some of the pipeline's most ardent supporters. *See, e.g.*, Statement of Senator Gravel, *Hearings on S. 970, S. 993 and S. 1565 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 4, at 56 (1973) ("While the four-year delay in construction of the Alaska Pipeline has been costly to the United States in balance of payments and a worsening energy shortage, it has—and I think most of us agree, including the oil industry—served a very useful purpose. A safer line will be constructed today than could have been constructed four years ago."); Statement of then Under Secretary of the Treasury William E. Simon, *Hearings on S. 970, S. 993 and S. 1565 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 4, at 127 (1973) ("past delays and resultant research have greatly reduced the magnitude of [the] risks").

[47] H.R. Rep. No. 93-414, 93d Cong., 1st Sess. 14 (1973).

6. The Court of Appeals' Decision Awarding Attorneys' Fees

The court of appeals' decision in *Wilderness Society II* is discussed at length in the Argument Section of this brief.[48] In summary, the court concluded that in view of the extraordinary factual circumstances of this case respondents and their counsel should not be required to bear the entire cost of the litigation. The equitable factors relied on by the court in reaching this determination related to the importance of the congressional policies effectuated, the benefits conferred on others by the litigation, the massive legal efforts required, and the burden that that effort placed on respondents and their counsel. *Wilderness Society II*, 495 F.2d at 1030-36.

Having concluded that respondents and their counsel should not be required to bear the entire cost of the litigation, the court determined that the "equities of this particular case" justified a partial shifting of respondents' fees to Alyeska. The court explained that the Trans-Alaska Pipeline is Alyeska's project; the litigation stemmed from actions and decisions taken by Alyeska and for which Alyeska alone was responsible; Alyeska participated in the litigation as a "major and real party in interest"; and an award of fees against Alyeska could not deter it from pursuing its interests in court. *Id.* at 1030-38.

In this connection, the court made no provision for the efforts of respondents' counsel prior to Alyeska's entry into the case in September 1971.

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[48] The *Bill of Costs* on which the court acted is reproduced at Jt. App. 209-221.

Nor did the court authorize any shifting of fees for any legal effort undertaken after that date that was not related to the preparation and presentation of the briefs and oral argument that served as the basis for the court of appeals' decision on the merits. Even with regard to the latter, the court limited the award against Alyeska to "half of the total fees," [19] the "amount . . . [to] be fixed in the first instance by the District Court, after hearing evidence if necessary as to the extent and nature of the services rendered." *Id.* at 1036.

SUMMARY OF ARGUMENT

The power to award attorneys' fees in the absence of specific statutory authorization is not confined within rigid categories. It is a flexible, equitable power whose exercise depends upon the particular

[19] The court explained:

> "Under 28 U.S.C. § 2412 . . . no attorneys' fees can be imposed against the United States . . . .
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>
> "Since Alyeska unquestionably was a major and real party at interest in this case, actively participating in the litigation along with the Government, we think it fair that it should bear part of the attorneys' fees . . . . *In recognition of the Government's role in the case, on the other hand, Alyeska should have to bear only half of the total fees. The other half is properly allocated to the Government and, because of the statutory bar, must be assumed by appellants* [*i.e.*, respondents]. In this manner the equitable principle that appellees [*i.e.*, *Alyeska*] bear their fair share of this litigation's full cost and the congressional policy that the United States not be taxable for fees can be accommodated." 495 F.2d at 1036. (Emphasis added). (Footnote omitted).

facts of particular cases. The fee award here rests upon a determination that (1) overriding equitable factors support a shifting of fees *from* respondents and (2) it is fair and equitable to shift a portion of those fees *to* Alyeska. That determination was made by a court of appeals uniquely immersed in the facts of the case. (Point I).

The court identified four factors which in its judgment supported a shifting of fees *from* respondents. Respondents' litigation vindicated important Congressional policies; it conferred substantial benefits on others; massive private litigation was necessary to achieve those ends; and the litigation, undertaken for no economic gain, placed heavy burdens on respondents and their counsel. Each of the factors cited by the court finds ample support in the record. (Point II A). Moreover, each of the factors was an appropriate one for the court to consider in deciding whether to authorize a shifting of fees from respondents. (Point II B). Taken together, they demonstrate that the decision to shift fees from respondents rests upon unusually compelling considerations.

The Mineral Leasing Act was a landmark conservation measure designed to correct past abuses in public land management. Its width limitation was a protective device consciously designed by Congress to preserve for itself the opportunity to safeguard the public lands. NEPA embodies important and comprehensive policies designed to ensure that federal actions which might have significant environmental consequences, including private projects requiring government approval, not be undertaken until their adverse consequences have been analyzed and

ways to minimize them considered. The litigation below vindicated the purposes of both these Acts precisely as Congress intended. The litigation required government and industry to consider carefully the risks associated with the construction of the Trans-Alaska Pipeline and it required them to seek Congressional approval before diverting the irreplaceable public lands of Alaska to pipeline use. (Point II A 1).

The litigation had other concrete and substantial benefits. First, the preliminary injunction obtained in April 1970 by respondents, when neither industry nor government was prepared to deal with the complex problems of an Arctic pipeline, prevented a possible environmental and engineering disaster. Second, as government and industry spokesmen have acknowledged, the litigation served as a catalyst for their joint efforts to reduce the project's risks. Third, and most important, the litigation led to major legislation which set forth a completely new charter for pipelines crossing public lands and imposed detailed environmental, technological, and other safeguards on the Trans-Alaska Pipeline. In its brief, Alyeska labors to create the impression that following the court's decision in *Wilderness Society I*, Congress merely rubber-stamped the construction of the Trans-Alaska Pipeline. This contention is totally belied by Pub. L. No. 93-153, which is reproduced at Appendix C to this brief and summarized at pp. 51-54, *infra*. (Point II A 2).

The Congressional policies effectuated and the benefits conferred were the result of a massive private litigation effort undertaken by respondents with no prospect of receiving monetary damages. There was

a substantial disparity in the resources available to the respective parties in the litigation and the effort required of respondents placed a heavy burden on them and their counsel. (Point II A 3, 4).

The appropriateness of these considerations as factors to be weighed in deciding whether to shift fees from respondents is amply demonstrated by this Court's attorneys' fee decisions, this Court's decisions concerning judicial effectuation of Congressional policies and access to the courts, Congressional legislation on attorneys' fees, and by the attorneys' fees decisions of the lower federal courts. (Point II B).

The court of appeals' determination that it was fair and equitable in the circumstances of this case to shift a portion of respondents' fees *to* Alyeska was also correct. Alyeska argues that it had no legal obligation under the Mineral Leasing Act or NEPA, and that therefore the court was without power to award fees against it. As a technical matter the Mineral Leasing Act did impose an enforceable legal obligation on Alyeska. But more to the point, this Court's decisions establish that the power to shift fees does not depend upon the formality of a party's technical obligation. It rests on the inherent judicial power to do equity in a particular situation. (Point III).

The court's power to shift fees to Alyeska was properly exercised in the circumstances of this case. Alyeska is no mere bystander unfairly selected out to pay attorneys' fees. The Trans-Alaska Pipeline is Alyeska's project—conceived and proposed by Alyeska's principals to promote their private economic interests. The litigation itself resulted from actions

and decisions for which Alyeska's principals were directly responsible. It was Alyeska's principals who decided to address their application to the Secretary of the Interior rather than to Congress. They were free at any time to change their decision and address their request to the Congress, but they declined to do so even after receiving a clear signal from the preliminary injunction. It was also Alyeska's principals who sought approval of the pipeline without adequately considering major technological and environmental problems posed by the project. As the moving party behind an inadequately planned project contemplating an unauthorized use of public lands, Alyeska was the direct cause of this litigation and the real party in interest. (Point III A).

To protect the enormous economic interests of its principals, Alyeska played a major and active role in the litigation. Alyeska conducted extensive discovery, filed massive briefs, and took the major portion of defendants' oral argument in both the district court and the court of appeals. (Point III B). Furthermore, although Alyeska vigorously opposed respondents, Alyeska received concrete benefits from the litigation—primarily from the correction of basic technological deficiencies in the proposed pipeline that threatened its physical integrity. Alyeska's principals are also in a position to distribute the fee award among members of the public who are the ultimate beneficiaries of an improved pipeline, an improved environment, and a proper functioning of our governmental system. (Point III C). And the award does not otherwise work any hardship or unfairness on Alyeska. (Point III D-F).

Finally, Alyeska raises several miscellaneous contentions concerning the judicial manageability of fee awards and the appropriateness of awarding fees to attorneys who receive salaries from non-profit organizations. These contentions are refuted by the facts of this case and by judicial precedent. (Point IV).

ARGUMENT

I. THE EQUITABLE POWER TO AWARD FEES IS NOT CONFINED TO RIGID SETS OF CASES.

The decision below rests on the premise that the "Supreme Court has . . . indicated . . . that the equitable power of federal courts to award attorneys' fees . . . is not a narrow power confined to rigid sets of cases." *Wilderness Society II*, 495 F.2d at 1029. This Court's decisions clearly support that premise.

Over the years, the Court has approved non-punitive equitable awards of attorneys' fees in a variety of factual contexts which, taken together, have come to be known as the "common benefits" exception to the American rule.[50] Behind the label "common benefits" is a diverse group of cases in which particular facts

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[50] As formulated by the Court in *F. D. Rich Co.* v. *United States*, 417 U.S. 116 (1974), this exception to the American rule applies "where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class." *Id.* at 129-30.

The Court has, in addition, "long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly or for oppressive reasons." *Id.* at 129 and the cases collected at 129 n.17.

were found sufficient to support an equitable fee award. Indeed, what is now called the "common benefits" exception has itself developed from a simpler "common fund" doctrine to accommodate new equitable considerations.

The genesis of the exception was the recognition that it is basically unfair to require a litigant to bear the expense of a litigation from which others profit. This principle was recognized initially in a very narrow group of cases in which a "common fund" was protected, created, or recovered as a result of the litigation. *E.g., Central R.R. & Banking Co.* v. *Pettus*, 113 U.S. 106 (1885); *Trustees* v. *Greenough*, 105 U.S. 527 (1882). It was then recognized that the same considerations of fairness should be applied to a case which did not actually result in a fund, but produced a similar effect by establishing a precedent for others. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 166 (1939). Recently, the Court has held that the benefits conferred upon others need not be pecuniary for the same considerations of fairness to apply. *Hall* v. *Cole*, 412 U.S. 1 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). In *Hall* and *Mills* the Court has also recognized that other equitable factors, not present in the common fund cases, may lend additional support for the shifting of fees. See p. 60 *infra*.

The ability to shift fees in a specific case depends, of course, on more than fairness to the plaintiff. There must exist, or there must be fashioned, an equitable fee shifting mechanism that is not unfair to others. Here, too, however, the Court has shown flexibility in approving mechanisms, which, even if

imperfect, reflect the specific circumstances of the case before it. In *Sprague*, *supra*, for example, no fund was actually established by the litigation. The Court recognized that any cost-spreading mechanism that might be devised would be imperfect since both secured and unsecured creditors would have to pay for it, even though only the former had benefited from the lawsuit. But the Court considered this as simply one factor to be considered "in the ultimate judgment . . . as to the fairness of making an award." 307 U.S. at 167.[51]

This Court's descriptions of the types of cases that might present sufficient equities to warrant the awarding of fees appear to have been carefully drafted so as to dispel any inference that the power to award fees for non-punitive reasons was somehow frozen within the mold of already decided common benefit cases.[52] In *Sprague*, the Court asserted that fee shift-

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[51] Following the remand, a fee was, in fact, awarded at the partial expense of non-benefitting general creditors by the district court. On appeal, the court of appeals upheld the equity of that award:

> "But if it was equitable to make the plaintiff whole for her expenses in establishing the lien, the District Court was warranted in concluding that the trivial disadvantage to the unsecured creditors was not a significant countervailing consideration." *Sprague* v. *Ticonic Nat'l Bank*, 110 F.2d 174, 177 (1st Cir. 1940).

[52] To have done otherwise would have been a startling departure from the manner in which equitable jurisdiction traditionally functions. As the Court recognized in *Sprague*:

> "As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power

ing is appropriate "in exceptional cases and for dominating reasons of justice." 307 U.S. at 167. In *Mills*, *supra*, the Court indicated that "both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery." 396 U.S. at 391-92. And in *Hall*, *supra*, the Court stated that "federal courts . . . may award attorneys' fees when the interests of justice so require" and that "federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery'." 412 U.S. at 4-5.

Indeed, at the very time that the Court was endeavoring to control encroachments on the American rule in the context of everyday commercial litigation, it did not thereby freeze all future permissible exceptions to the rule into the precise mold of already-decided cases. While expressly reserving judgment "on the validity of the scope of that doctrine," the Court took note that "the lower courts have . . . applied a [private attorney general] rationale for fee shifting based on the premise that the expense of litigation may often be a formidable if not insur-

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will alone retain equity as a living system and save it from sterility." 307 U.S. at 167.

Compare, *Union P. Ry.* v. *Chicago R.I. & P. Ru.*, 163 U.S. 564, 601 (1896):

> "As has been well said, equity . . . 'has always preserved the elements of flexibility and expansiveness, so that new [remedies] may be invented, or old ones modified, in order to meet the requirements of every case' . . . ."

mountable obstacle to the private litigation necessary to enforce important public policies." *F. D. Rich*, *supra*, 417 U.S. at 130.[53]

Thus, the approach taken by the court below in looking to the "equities of this particular case" and not to some inflexible formula was fully consistent with this Court's decisions. The appropriateness of the court's award should be decided not on the basis of abstract predetermined formulas as Alyeska suggests but on traditional grounds of (1) whether the overriding equitable factors identified by the court support a shifting of fees *from* respondents in this case, and, if so, (2) whether it is fair and equitable in the circumstances of this case to shift those fees *to* Alyeska.

II. THE EQUITABLE FACTORS IDENTIFIED BY THE COURT SUPPORT A SHIFTING OF FEES FROM RESPONDENTS IN THIS CASE.

The court of appeals identified four equitable factors that in its judgment were sufficiently strong in "this particular case [to] support an award of attorneys' fees to the successful [respondents]." *Wilderness Society II*, 495 F.2d at 1036.

The equitable factors relied on were that the litigation had vindicated important Congressional policies; that it had conferred substantial benefits on others besides respondents; that massive litigation by respondents as private citizens was necessary to achieve those ends; and that the litigation, undertaken for

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[53] The lower court cases cited in *F. D. Rich*, 417 U.S. at 130 n.19, and other "private attorney general" cases are collected at note 91, *infra*.

no economic gain, placed heavy burdens on respondents and their counsel. Each of the factors cited by the court finds ample support in the record. Moreover, each of the factors was an appropriate one for the court to consider in deciding whether to authorize a shifting of fees from respondents in this case. Taken together, they demonstrate that the decision to shift fees from respondents rests upon unusually compelling considerations.

A. The Factors Identified by the Court Are Amply Supported by the Record

1. *The Statutory Interests Involved Were Important*

The court's conclusion that "vital statutory interests" were at stake in the litigation below is clearly correct. See *Wilderness Society II*, 495 F.2d at 1032.

As previously discussed, the Mineral Leasing Act was a landmark conservation measure designed to correct past abuses in public land management. When it enacted the law, Congress intended to reassert its own control over the use and disposition of the public lands. *Wilderness Society I*, 479 F.2d at 859-860, 864. The debates cited at length in the court of appeals' opinion demonstrate that "Congress seemed to be aware that the width limitation [imposed on pipeline rights-of-way] might . . . in the future prove to be . . . insufficient," but "Congress intended to maintain control over pipeline rights-of-way and *to force the industry* to come back to Congress if the amount of land granted was insufficient for its purposes." (Emphasis added). *Id.* at 860, 892. Under the scheme of the Act, Congress would

then have the opportunity to decide whether more public land should be granted and, if so, whether specific conditions and safeguards should be attached to its use.

Even if Congress had never enacted the National Environmental Policy Act of 1969, the case below would have been no "ordinary, run-of-the-mill litigation." See *Sierra Club* v. *Morton*, 405 U.S. 727, 755 (1972) (Mr. Justice Blackmun, dissenting). On a general level, as Justice Blackmun recently stated in an analogous context, "the propriety of the 'dual permit' device as a means of avoiding . . . [a] limitation imposed by Congress" presented an issue that "raise[d] important ramifications for the quality of the country's public land management." [24] More specifically, Alyeska's Trans-Alaska Pipeline proposal raised "significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances." *Id.* at 755. The public lands

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[24] *Sierra Club* v. *Morton*, 405 U.S. 727, 757 (1972) (dissenting opinion). Significantly, the Congressional limitation contained in the Mineral Leasing Act was even stronger than that in issue in *Sierra Club*. As the court below noted:

> "We need not voice our views with respect to the Ninth Circuit's opinion in . . . . [*Sierra Club* v. *Hickel*, 9 Cir., 433 F.2d 24 (1970), *affirmed only on the ground of lack of standing to sue*, 405 U.S. 727 (1972)] . . . . [T]he statute involved in that case, 16 U.S.C. § 497 (1970), has no provision comparable to that in Section 28 of the Mineral Leasing Act expressly stating that no rights-of-way for the uses in question shall be granted except under the provisions, conditions and limitations of the statute." *Wilderness Society I*, 479 F.2d at 869-70.

that Alyeska selected for its pipeline are unique and irreplaceable. See Appendix A, *infra*. The project, however conceived and executed, will substantially and irretrievably alter their ecology and character for the rest of time. The preservation of Congress' right to protect these lands from needless degradation and to determine their most beneficial use was a matter of obvious national importance.

The importance of the environmental concerns that prompted the litigation below was confirmed and given concrete focus in 1969 when Congress passed the National Environmental Policy Act, the first and broadest of a series of federal statutes specifically designed to protect and restore the national environment.[53] NEPA was predicated on the recognition by Congress that:

> "As the evidence of environmental decay and degradation mounts, it becomes clearer . . . that the Nation cannot continue to pay the price of past abuse . . . .
>
> "If the United States is to create and maintain a balanced and healthful environment, new means and procedures to preserve environmental values in the larger public interest, to coordinate Government activities that shape our future environment, and to provide guidance and incentives for State and local government and for private enterprise must be devised."[54]

[53] *See also* Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.* (Supp. II, 1972); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 *et seq.* (Supp. II, 1972); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* (Supp. II, 1972); Clear Air Amendments of 1970, 42 U.S.C. § 1857(a) *et seq.* (1970); Federal-Aid Highway Act of 1966, 23 U.S.C. § 138 (1970).

In NEPA, Congress expressly declared that the Nation's goals include "fulfill[ing] the responsibilities of each generation as trustee of the environment for succeeding generations" and "attain[ing] the widest range of beneficial uses of the environment without degradation [and] risk to health or safety."[55] In recognition of the "critical importance of restoring and maintaining environmental quality to the overall welfare and development of man,"[56] Congress established the "action-forcing"[57] procedures of Section 102(2)(c). These procedures are designed to ensure that federal actions which might have significant environmental consequences, including private projects requiring government approval, be delayed until their consequences have been analyzed and ways to minimize them considered.

[54] S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969). *Compare President Nixon's Special Message to the Congress Outlining the President's 1972 Environmental Program*, 8 Pres. Doc. 218-19 (Feb. 8, 1972):

> "'[I]t is literally now or never' for true quality of life in America . . . . Environmental concern must crystallize into permanent patterns of thought and action. What began as an environmental awakening must mature finally into a new and higher environmental way of life."

[55] Section 101(b), 42 U.S.C. § 4331(b).

[56] Section 101(a), 42 U.S.C. § 4331(a).

[57] *Hearings on S. 1075, S. 237, and S. 1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 116 (1969) (remarks of Senator Jackson).

NEPA's enactment leaves no doubt that "the commitment to improving and protecting our natural environment" is, as the court below held it to be, "among the most important" facets of "one of the most vital of current national policies." *Wilderness Society II*, 495 F.2d at 1034.[60] As applied to the proposed Trans-

[60] Numerous other courts, including this Court, have acknowledged the national importance of environmental protection, and the major role to be played by NEPA in preventing environmental abuse. *E.g., United States* v. *SCRAP*, 412 U.S. 669, 693 (1973) (NEPA is a "major federal [effort] at reversing the deterioration of the country's environment"); *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society"); *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1174 (6th Cir. 1972) (NEPA is a clear Congressional mandate recognizing "the obligation of all citizens" to incorporate environmental considerations into the decisionmaking process); *Arlington Coalition on Transp.* v. *Volpe*, 458 F.2d 1323, 1326 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972) ("It is the declared public policy of the United States to protect and preserve the national environment "to the fullest extent possible' "); *Lathan* v. *Volpe*, 455 F.2d 1111, 1116, 1121 (9th Cir. 1971) (NEPA is designed to implement "important public policies" and to prevent "environmental harm"); *National Helium Corp.* v. *Morton*, 455 F.2d 650, 656 (10th Cir. 1971) (National interests are protected by NEPA's requirement that agencies "assess environmental consequences in formulating policies"); *Scenic Hudson Preserv. Conf.* v. *FPC*, 453 F.2d 463, 473 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972) (full consideration and exploration of environmental factors is required by NEPA to ensure "the conservation of natural resources" and the "maintenance of natural beauty"); *Calvert Cliffs' Coord. Comm.* v. *Atomic Energy Comm'n*, 449 F.2d 1109, 1122 (D.C. Cir. 1971) ("The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action"); *Zabel*

Alaska Pipeline, the Mineral Leasing Act and NEPA fit together to provide a single, clear national objective and a set of mutually reinforcing procedural safeguards designed to protect the public lands of Alaska from unnecessary environmental degradation.

2. *The Benefits Conferred by the Litigation Were Substantial*

The court's conclusion that "concrete and . . . important benefits" resulted from the litigation is amply supported by the record. See *Wilderness Society II*, 495 F.2d at 1033.[61] These benefits furthered the objectives of both the Mineral Leasing Act and NEPA. They resulted from respondents' early recognition of the project's risks, respondents' perserverance in the litigation over a three-year period, and the ultimate success of respondents' efforts to compel Alyeska to go to Congress.

First, Alyeska was not prepared for pipeline-related construction in 1970 and respondents averted a possible environmental and engineering disaster by obtaining a preliminary injunction at that time. *Wilderness Society II*, 495 F.2d at 1033 n.3.

No one now disputes that "industry [had] seriously underestimated the real technical difficulties of the

v. *Tabb*, 430 F.2d 199, 200 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971) (the preservation of our environment is an issue of "spectacular public importance").

[61] The court of appeals noted that the litigation below also produced other equally important, but less tangible, benefits relating to "the proper functioning of our system of government under the Constitution." *Wilderness Society II*, 495 F.2d at 1033.

task and failed to appreciate fully—particularly at the outset—the new conditions for decision-making in matters that substantially affect the environment. On its part, government was ill-equipped both institutionally and informationally for dealing with the complex problems of the pipeline." [62]

Alyeska's lack of preparedness threatened more than avoidable (and potentially massive) degradation of irreplaceable wilderness, wildlife, fish, and vegetation. A major miscalculation on any one of a broad range of environmental problems (permafrost, erosion, earthquakes, river scour, flooding) threatened "*the physical integrity of the pipeline itself.*" [63] By definition, averted potential disasters cannot be quantified. But in the present case, the risk of going ahead on a piecemeal basis—as was contemplated in 1970—was clearly significant. And, in a very real sense, respondents' early intervention helped to save Alyeska's principals not only from their own errors but from direct, substantial and potentially irrecoverable economic loss.[64]

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[62] Address by the Honorable Russell E. Train to the Joint Judicial Conference of the Eighth and Tenth Circuits, June 29, 1973, quoted at *Wilderness Society II*, 495 F.2d at 1033-34 n.3.

[63] *See* Address by Russell E. Train, *supra*:

> "If the pipeline had been constructed using the original design specifications, it would very likely have resulted in not only very serious environmental damage but also serious operational problems. Indeed, the physical integrity of the pipeline itself was very much at stake." *Ibid.*

[64] As Administrator Train has explained:

> "[T]he case of the Alaska pipeline has not been simply one of aesthetics, or of concern over wildlife and wilderness disturbance, or worries over water pollution, important as all of these are. It was clearly an example where sound environmental analysis was essential to sound engineering and siting." *Ibid.* *See* p. 7 *supra*.

Former Secretary of the Interior Hickel has been quoted as asserting that Alyeska's principals initially brought a "temperate zone mentality" to Alaska, reckoning that what they had done in Oklahoma they could do just as well in Alaska. His conclusion, while stated in blunter terms, mirrors that of Mr. Train: "It wouldn't have just been an environmental disaster, it would have been an engineering disaster." *The Alaska Pipeline*, Smithsonian (Vol. 5, No. 7) 38, 42 (October 1974). *Compare* Statement of Alaska State Pipeline Coordinator Chuck Chapman, quoted in *Alaska Construction & Oil* 24 (June 1974) ("In 1969 when . . . TAPS [Trans-Alaska Pipeline System] wanted to build the pipeline, they hadn't done their homework.").

[65] Address by Russell E. Train, *supra*, note 62.

A quick insight into the progression of that process can be gained if the Court were to *compare* the sketchy papers that accompanied Alyeska's principals' initial application, Rule 9(h) Documents, Tab B (R. 152) *with* the 29-volume Project Description ultimately submitted (Ad. Rec. 1.1.2.3) (R. 239) and *compare* the Interior Department's Final Impact Statement on the project (Ad. Rec. 2.14) (R. 239) *with* the Department's earlier efforts—the eight-page document dated March 20, 1970, titled "Environmental Statement Yukon

Second, once the preliminary injunction was issued, the litigation served as a catalyst for the joint efforts of industry and government to reduce the project's risks. *Wilderness Society II*, 495 F.2d at 1034-35.

The process that culminated in Congress' authorization of the Trans-Alaska Pipeline was, as Administrator Train has characterized it, "one of learning for both industry and government." [65] The reduction

in risk that resulted from this process was cited by Congress as a determinant factor in its decision to authorize the project. See legislative history cited at pp. 26-28 *supra*.

Some of the more significant changes that reduced the project's risks can be summarized briefly. Alyeska's principals originally proposed to bury all but five percent of the line. The consequence would have been the thawing of permafrost to such an extent that resulting pressures on the pipe would have caused numerous ruptures. As now conceived, more than 300 miles of pipeline that were originally to be buried will now be above ground. Alyeska's principals similarly planned to cross all rivers by burying the pipe beneath river beds. If they had done so, numerous hydrologic hazards would have threatened the integrity of the pipeline. Current design plans now call for several overhead crossings.

The delay in project start-up also permitted both Alyeska and the government to undertake detailed geologic, soils, and engineering studies on many aspects of the environment that resulted in a safer pipeline design. Because of these studies, there have been numerous changes in the alignment of the route to avoid hazardous areas that the original route would have traversed. Other substantial risk reduction measures include a specialized elevated seismic design to carry the pipeline over the Denali Fault Zone[46]

River - North Slope Road" (P. Docs. I, Tab K) (R. 207) and the descriptive document dated January 15, 1971, titled "Draft Impact Statement" (Ad. Rec. 2.13) (R. 239).

[46] This is a major fault zone on which there has been extensive surface displacement over time.

and the development of specialized devices to permit safer pipeline burial in permafrost.[47]

Obviously many factors contributed to the development of an environmentally and technologically safer pipeline project. But both government and industry alike have acknowledged that this litigation played an important role in the process. On several occasions Secretary Morton asserted that his Department's efforts were responsive to issues raised in the litigation:

> "We are under an injunction not to issue a permit . . . . [B]efore we go to court we better look at the whole work . . . ."[48]
>
> * * * *
>
> "[W]e are taking as thorough a process as we can, definitely involving the best talents we can develop within the Government and without the Government as consultants to go at this job so that when we make a decision it will be a decision that has all of the criteria to back it up. The matter then will be an easier matter for the courts to decide."[49]

Indeed, Secretary Morton concluded his deposition in this case with an expression of appreciation for respondents' efforts:

[47] See Ad. Rec. 1.1.2.3 (R. 239).

[48] Statement of Secretary Morton, Press Conference, October 4, 1971, P. Docs. II, Tab G, p. 30 (R. 207).

[49] Statement of Secretary Morton, *Hearings on S. 35, S. 835, and S. 1571 Before the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess., pt. 2, 455 (April 29, 1971); P. Docs. II, Tab D, p. 455 (R. 207).

> "I want to thank all of you. I think it is just going through all of this that we are going to have a better world. I am for it." [70]

And the president of one of Alyeska's major principals, in testimony before the Senate Committee on Interior and Insular Affairs, candidly admitted:

> "We have learned from the environmentalists. I think it is perfectly true to say we can build a better line today, a better and more environmentally safe line today, because of the intervention of the environmentalists than we could have built 4 years ago." [71]

Third, and most significant, the result of respondents' success in "forcing Alyeska to go to Congress" was the imposition by Congress of "important new requirements" which "protect the public interest" and

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[70] Deposition of Secretary Morton, June 24, 1972, pp. 71-72 (R. 225).

[71] Statement of Thornton F. Bradshaw, President, Atlantic Richfield Co., *Hearings on S. 1040, S. 1041, S. 1056, S. 1081 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 2, at 383 (1973). *Accord*, Interview with Governor William A. Egan of Alaska, *Alaska Construction & Oil Report* 48 (February 1971) ("the hue and cry, as they called it in the beginning, may have been a blessing in disguise for the long-range operations of this kind of development"). *Compare Scenic Hudson Preserv. Conf. v. FPC*, 453 F.2d 463, 481 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972):

> "The petitioners performed a valuable service in that earlier case, and later before the Commission. By reason of their efforts the Commission has reevaluated the entire Cornwall project. The modifications in the project reflected a heightened awareness of the conflict between utilitarian and aesthetic needs."

reflect the environmental, technological, and other concerns that prompted the litigation below. *Wilderness Society II*, 495 F.2d at 1033.

In its brief, Alyeska labors to create the impression that following the court's decision in *Wilderness Society I* Congress made "a legislative finding that the Department's efforts were fully adequate" and quickly rubber-stamped the construction of the Trans-Alaska Pipeline by simply removing the previous width limitation. See P. Br. 35. This is simply untrue. Although there were those urging that the national interest required the immediate commencement of pipeline construction, Congress spent ten months conducting hearings, deliberations and debate, in order to assure careful consideration of the merits of the pipeline proposal. Most significantly, the end result of this process, Pub. L. No. 93-153 (Appendix C, *infra*), contains on its face the best evidence of the concrete and substantial benefits of the litigation and the importance that Congress placed on the concerns that it raised.

Thus, Title I sets forth a completely new charter for pipelines crossing public lands. Explicit "Pipeline Safety" (Section 28(g)) and "Environmental Protection" (Sec. 28(h)) requirements—including requirements "designed to control or prevent (i) damage to the environment (including damage to fish and wildlife habitat, (ii) damage to public or private property and (iii) hazards to public health and safety"—have now for the first time been imposed on such pipelines by Congress. The Secretary of the Department of Transportation is now required to "cause the examination of all pipelines and associated fa-

cilities on Federal lands" and to "cause the prompt reporting of any potential leaks or safety problems" (Section 28(w)(3)); provisions are made for the suspension or termination of rights-of-way for failure to comply with the Act's requirements (Section 28(o)); and annual reports are required from the Secretary of the Interior on the "safety and environmental requirements imposed" by the Act (Section 28(w)(1)) and from the Secretary of the Department of Transportation on "any potential dangers of or actual explosions, or potential or actual spillage on Federal lands" (Section 28(w)(4)).

Significantly, the new Act reflects much the same concern for public land use that prompted the restrictive width limitation of its predecessor and does not simply confer unfettered discretion on the Secretary. Thus, Congress retained the fifty foot right-of-way limitation "unless the Secretary or agency head finds, *and records the reasons for his finding*, that in his judgment a wider right-of-way is *necessary* for operation and maintenance after construction, or to protect the environment or public safety" (Section 28(d)) (emphasis added). The Act requires the Secretary "to notify the House and Senate Committees on Interior and Insular Affairs promptly upon a receipt of an application for a right-of-way for a pipeline twenty-four inches or more in diameter" and to refrain from issuing permits for such pipelines until those Committees have an opportunity to act (Section 28(w)(2)).

Moreover, the Act explicitly adopts the principle of one of the key arguments in respondents' NEPA brief concerning the desirability of common corridors

for oil and gas pipelines. See p. 21 n. 36 *supra*. It provides that "[i]n order to minimize adverse environmental impacts and the proliferation of separate rights-of-way across Federal lands, the utilization of rights-of-way in common shall be required to the extent practical" (Section 28(p)). Moreover, "[i]n order to minimize adverse environmental impacts and to prevent the proliferation of separate rights-of-way across Federal lands" the Act requires the Secretary of the Interior to "review the need for a national system of transportation and utility corridors across Federal lands and submit a report of his findings and recommendations to the Congress and the President by July 1, 1975" (Section 28(s)).

The environmental and other safeguards imposed on the construction of the Trans-Alaska Pipeline in Title II of the Act are similarly far-reaching. The "[r]ights-of-way, permits, leases and other authorizations" to be issued to Alyeska are expressly made subject to the various environmental and technological safeguards of Title I (Section 203(c)).[73] Strict liability has been imposed on Alyeska for "damages in connection with or resulting from activities along or in the vicinity of the . . . right-of-way" (Section 204(a)(1)). Specifically, "[i]f any area within or without the right-of-way . . . is polluted . . . and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant shall be the expense of [Alyeska]" (Section 204(b)); there shall be strict liability "without regard to fault in accordance with the provisions of this subsection

[73] With the exception of subsections (h)(1), (k), (q), (w)(2), and (x).

for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil from . . . vessel[s]" transporting pipeline oil (Section 204(c)(1)); and Alyeska is now obligated by law to maintain a $100,000,000 liability fund to satisfy claims (Section 204(c)(5)).

Finally, specific provisions are also included in the Act relating to vessel construction (Section 401) and vessel traffic control (Section 402) for the sealeg portion of the system.

3. *Private Enforcement Was Required To Vindicate the Statutory Interests and Confer the Benefits Identified by the Court*

The court of appeals concluded that this was a case where the effectuation of the statutory interests and the conferral of the benefits described above "depend[ed] on the diligence of private attorneys general and their willingness to bring suit." *Wilderness Society II*, 495 F.2d at 1034. Alyeska speculates that the "beneficial results" cited by the court "might have occurred" without respondents' lawsuit. P. Br. 11, 36-42.[73] But the record clearly supports the court's decision to the contrary.[74]

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[73] Alyeska's Brief is contradictory on this point. On the one hand, Alyeska argues that even without the litigation pipeline construction would not have started until full environmental studies were undertaken and that these studies would have been done without respondents' litigation. P. Br. 36-42. On the other hand, Alyeska argues that beginning in 1970 respondents caused a three-year delay in the pipeline's construction by their litigation seeking environmental studies. P. Br. 38. Alyeska cannot have it both ways.

[74] Alyeska now apparently seeks full-blown formal "hearings" on the causation issue. P. Br. 42. But Alyeska never requested such hearings before the court of appeals and never expressed any dissatisfaction with the procedures that court used in ruling on respondents' Bill of Costs. In fact, the procedure followed by the court was both fair and workable, and afforded Alyeska the unfettered opportunity to present all of its causation arguments.

Obviously, there can be no dispute that private enforcement was essential to assure that the objective of the Mineral Leasing Act's width limitation was fulfilled. This case was one, not unique in our history, where government officials were willing to acquiesce in an unauthorized private use of public lands. Even after the clear warning of the preliminary injunction, Alyeska and the Government were determined to go forward with the pipeline project without seeking Congressional approval. As the court below so vividly described the situation: "These companies have now come into court, accompanied by the executive agency authorized to administer the statute, and have said, 'This is not enough land, give us more'." *Wilderness Society I*, 479 F.2d at 891.

Since Alyeska was unwilling to observe and the Government was unwilling to enforce Congressional land use policy, private enforcement of the law was necessary. And no one can deny that the new environmental, technological, and land use safeguards imposed by Pub. L. No. 93-153, on all future pipelines crossing public lands as well as on the Trans-Alaska Pipeline, are the direct consequence of respondents' success in the court of appeals. Without that success clearly there would have been no Pub. L. No. 93-153.

Insofar as the complementary objectives of NEPA were concerned, it is indisputable that in 1970 Gov-

ernment and industry were prepared to proceed on a piecemeal basis with the construction of the Trans-Alaska Pipeline without having evaluated the grave potential risks to the environment and to the physical integrity of the pipeline entailed in such an approach. The district court determined at that time that irreparable injury was the likely result of that course of action. *Wilderness Society* v. *Hickel*, 325 F. Supp. at 424. For a considerable time thereafter —as evidenced by the wholly inadequate "Draft Impact Statement" of January 1971 prepared with Alyeska's assistance—government and industry working together were still not doing the job. In short, continued private citizen action was necessary as it has proved necessary in other environmental matters.[75]

[75] The need for private enforcement of Congressional environmental policy is widely recognized. In its second annual report the Council on Environmental Quality stated:

> "Perhaps the most striking recent legal development has been the step-up in citizen 'public interest' litigation to halt degradation of the environment. In the face of a history of administrative decisions that ignored environmental impacts and against a tide of legislative delays in developing pollution control law, citizens concluded that they must use the courts to cure the neglect. The citizen litigation has not only challenged specific government and private actions which were environmentally undesirable. It has speeded court definition of what is required of Federal agencies under environmental protection statutes. The suits have forced greater sensitivity in both government and industry to environmental considerations. And they have educated lawmakers and the public to the need for new environmental legislation." *Second Annual Report*, 155-56 (1971)

[Footnote continued on page 57]

4. *The Litigation Placed Heavy Burdens on Respondents and Their Counsel*

Finally, the record also clearly supports the court's characterization of the litigation below as one "of monumental proportions" that placed a "heavy burden" on respondents. *Wilderness Society II*, 495 F.2d at 1036.

Here, as in *Bradley* v. *Richmond School Board*, 416 U.S. 696, 718 (1974), there was substantial "disparity in the respective abilities of the parties adequately to present and protect their interests." Respondents were required to match their modest financial resources against the enormous resources of the Federal Government and a consortium of large oil companies.[76] *Compare Bradley* v. *Richmond School Board*, 416 U.S. at 718 n.25 (" 'Ranged against the

[75] [Continued]

The need for private enforcement has also been recognized by Congress in the Clean Air Amendments of 1970 and the Federal Water Pollution Control Act Amendments of 1972, both of which specifically provide for citizen suits and for attorneys' fees awards to facilitate such suits. 42 U.S.C. § 1857h-2(d) (1970); 33 U.S.C. § 1365(d) (Supp. II, 1972). *See* pp. 65-66, *infra*.

[76] The seven beneficial owners of Alyeska constitute, respectively, the second (Exxon), sixth (Mobil), twenty-second (ARCO), thirty-seventh (Phillips), fiftieth (Union), eighty-sixth (Sohio), and eighty-ninth (Amerada-Hess) largest corporations by net sales in the United States. 1974 *National Petroleum News Factbook* 29. (Ranked according to the *Fortune* directory of the 500 largest industrial corporations, May 1973.) Their distinguished counsel in the litigation below and before this Court is the large and prestigious law firm of Steptoe & Johnson. *See Martindale-Hubbell Law Directory*, vol. 1, 2954B-2959B (1974).

plaintiffs have been the legal staff of the City Attorney's office and retained counsel highly experienced in trial work . . . . Few litigants—even the wealthiest—come into court with resources at once so formidable and so suited to the litigation task at hand . . . .' "); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972) ("the average . . . litigant must hesitate, if not shudder, at the thought of 'taking on' an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expenses rendered"); *NAACP* v. *Allen*, 340 F. Supp. 703, 710 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974) (" 'an enterprise on which any private individual should shudder to embark' ").

Extensive factual discovery, expert scientific analysis, and legal research on a broad range of technological, environmental, and land use questions were required to produce "a record and set of briefs commensurate with the multi-billion-dollar project at stake." *Wilderness Society I*, 479 F.2d at 846. The preparation and presentation of the record, briefs, and oral argument that served as the basis of the court of appeals' decision in *Wilderness Society I* consumed over 4,500 hours of attorneys' time, not to mention the substantial effort (amounting to several hundred man-hours) expended by volunteer legal interns and clerical staff. A full description of the efforts undertaken in this regard is contained in the *Affidavit of Counsel* attached to the Bill of Costs at Jt. App. 213-19.

The court of appeals noted that "[t]his burden was assumed not in the hope of obtaining a monetary

award." *Wilderness Society II*, 495 F.2d at 1032. And it was in fact carried out under heavy constraints imposed by respondents' modest budgets. See *Affidavit of Counsel, supra.* Obviously, therefore, the burden of this litigation posed a particularly formidable obstacle to the beneficial results it produced. And, as the court declared:

> "In such cases, '[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.' Newman v. Piggie Park Enterprises, Inc., . . . 390 U.S. at 402 . . . . Where the law relies on private suits to effectuate congressional policy in favor of broad public interests, attorneys' fees are often necessary to ensure that private litigants will initiate such suits. *See* Lee v. Southern Home Sites Corp., . . . 444 F.2d at 145." [11]

B. The Factors Identified by the Court Are Appropriate Factors in Determining Whether To Shift Fees.

The appropriateness of the factors which guided the fee award in the present case is amply demonstrated by this Court's attorneys' fees decisions, this Court's decisions concerning judicial effectuation of Congressional policies and access to the courts, Congressional legislation on attorneys' fees, and the attorneys' fees decisions of lower federal courts.

Just last Term, this Court recognized that "the expense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important policies." *F. D. Rich Co.*

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[11] *Wilderness Society II*, 495 F.2d at 1030.

v. *United States*, 417 U.S. at 130. Thus, this Court is aware that at least in some cases private enforcement of Congressional policies requires a mechanism which mitigates the costs of litigation. The factors relied upon by the court of appeals are appropriate because they serve precisely this function. These factors describe "overriding considerations" which justify a fee award in "the interests of justice." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 391; *Hall* v. *Cole*, 412 U.S. at 5.

This Court's attorneys' fees decisions in "common benefit" cases have made clear that where a litigant produces benefits to others, a fee award may be appropriate. As part of the evolution of the "common fund" exception into a "common benefits" exception, the Court in both *Mills* and *Hall* recognized that there is an added reason for shifting fees, not previously alluded to in the earlier cases, when the benefits conferred by the litigation effectuate Congressional policy. In *Mills*, the Congressional policy effectuated was that of "fair and informed corporate suffrage." 396 U.S. at 396. In *Hall*, it was the Congressional policy "that all union members be guaranteed at least 'minimum standards of democratic process . . . .'" 412 U.S. at 7.

As a corollary, the Court noted in *Hall* that when the litigation effectuates Congressional policy, fee shifting is appropriate because it will affirmatively facilitate such litigation. The Court recognized the "'unescapable fact'" that when the effectuation of Congressional policy depends upon private enforcement, litigation expenses serve as a barrier to that enforcement. In such cases, effective implementation

may depend on the ability of courts to fashion an equitable mechanism for the shifting of fees.[78]

In analogous areas, the Court has emphasized that courts have a responsibility to exercise their equitable powers to facilitate the private enforcement of Congressional statutes. As the Court has explained, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964).[79] Because government enforcement resources are limited and because sometimes the government does not correctly follow the law, private parties must often be relied upon to enforce the law. *E.g.*, *Trafficante* v. *Metropolitan Life Insurance*

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[78] To deny attorneys' fees, the Court concluded:

> "'[W]ould be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own . . . . An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it.'" 412 U.S. at 13, quoting court of appeals opinion, 462 F.2d 777, at 780-81.

[79] *See generally Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 414 n. 13 (1968); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). This Court has noted that equity courts have particularly broad powers to mold remedies when public interests as opposed to mere private interests are involved. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); *United States* v. *Morgan*, 307 U.S. 183, 194 (1939); *Virginian Ry.* v. *System Fed'n*, 300 U.S. 515, 552 (1937).

Co., 409 U.S. 205, 211 (1972) and cases cited; *see Associated Industries* v. *Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated on other grounds*, 320 U.S. 707 (1943). Thus, this Court has not hesitated to imply a private right of action to facilitate the enforcement of federal statutes which were merely declarative of certain rights,[50] or which on their face provided only for enforcement by the government.[51] In many circumstances, the Court has implied a right to compensatory damages where the statute failed to provide for any.[52] In short, the court of appeals was on traditional ground when it provided an equitable remedy in order to facilitate private enforcement necessary to effectuate Congressional policies.

Other cases in this Court have long recognized both the significance of access to the courts and the reality of economic burdens to litigation. For example, this Court has granted citizen groups access to the courts through decisions on standing.[53] It has held that access to the courts must be protected because litiga-

[50] *E.g.*, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 414 n.13 and cases cited (1968); *cf. Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

[51] *See, e.g.*, *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969); *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964).

[52] *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 202, 204 (1967); *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 296 (1960); *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192, 207 (1944); *Texas & P. Ry.* v. *Rigsby*, 241 U.S. 33, 39-40 (1916); *J. I. Case Co.* v. *Borak*, *supra*; *cf. Bivens* v. *Six Unknown Fed. Narcotics Agents*, *supra*.

[53] *E.g.*, *United States* v. *SCRAP*, 412 U.S. 669 (1973). *See also Office of Comm'n of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966).

tion is frequently more than "a technique of resolving private differences." [54] And in numerous decisions, it has struck down economic burdens to litigation or mitigated the impact of those burdens.[55] These cases demonstrate that the court of appeals properly considered, as one factor justifying the fee award in the present case, that it would relieve economic burdens which make access to the courts more difficult.

Congressional legislation on attorneys' fees provides additional support for the factors relied upon by the court of appeals. These expressions of Congressional policy are significant because, as the Court noted in *Mills*, both court-developed and Congressionally-developed fee awards rest upon the same basic determination that "overriding considerations indicate the need for such a recovery." 396 U.S. at 391-92. In determining how to exercise their equitable powers, courts have traditionally been guided by Congressional policy determinations:

> "This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in

[54] *NAACP* v. *Button*, 371 U.S. 415, 429-30 (1963); *see also California Motor Transp. Co.* v. *Trucking Unltd.*, 404 U.S. 508 (1972).

[55] *E.g.*, *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). It has been noted that one main purpose of the Federal Rules concerning discovery is to simplify litigation and thereby eliminate some of its costs. *Developments—Discovery*, 74 Harv. L. Rev. 940, 945 (1961).

matters of statutory construction but also in those of decisional law."[30]

The Congressional policy with regard to the award of fees in appropriate cases is reflected in many statutes. For example, this Court recognized in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), that the fee provisions of Title II of the Civil Rights Act of 1964 were premised on the recognition that there were economic barriers to the effectuation of Congressional policies through private litigation. As the court noted in *Newman*:

> "When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking

[30] *Mo[illegible]gne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 390-91 (1970); *see also Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). It is, of course, by now well settled that Congress' action in specifically providing for fee awards to effectuate some statutes hardly precludes the courts from exercising their own powers in connection with other statutes. Indeed, this Court has specifically held that in situations where Congress has specifically made provisions for the award of fees in some titles of statutes but not others, courts are not precluded from exercising their equitable power to award fees with regard to the latter. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 390-91; *Hall* v. *Cole*, 412 U.S. at 10-11.

> the injunctive powers of the federal courts." 390 U.S. at 402.[31]

Another example is the recently passed amendment to the Freedom of Information Act. In explaining why the courts should assess reasonable attorneys' fees against the United States in productive cases, the Senate report stated:

> "Too often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law . . . The necessity to bear attorneys' fees and court costs can thus present barriers to the effective implementation of national policies expressed by Congress in legislation."[32]

The Clean Air Amendments of 1970, 42 U.S.C. § 1857h-2(d), and the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1365(d) provide particular guidance for the present case because both involve environmental policies. In specifically providing for a private right of action under both statutes, Congress recognized that private enforcement was necessary to effectuate these nationally important environmental policies.[33] Moreover, both

[31] *See also Bradley* v. *Richmond School Bd.*, *supra*, 416 U.S. at 719; *Northcross* v. *Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973).

[32] S. Rep. No. 93-854, 93d Cong., 2d Sess. 17-18 (1974).

[33] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36-39 (1970) (Clean Air Amendments); S. Rep. No. 92-414, 92d Cong., 1st Sess. 79-82 (1971) (Federal Water Pollution Control Act Amendments); H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 132 (1972) (Federal Water Pollution Control Act Amendments).

Acts specifically provide for attorneys' fees. Since only injunctive relief is generally available under each statute, significant economic obstacles may stand in the way of private enforcement. Thus, the Congressional committees which reported out the attorneys' fees provisions in each statute stated that "in bringing legitimate actions . . . citizens would be performing a public service and in such instances the courts should award costs of litigation to such party." [10]

In short, the factors relied upon by the court of appeals were the same factors identified by Congress in legislation providing for fee shifting.

Finally, the appropriateness of the factors guiding the fee award in the present case is supported by the decisions of numerous lower courts which have relied upon these same factors in granting non-statutory fee awards in other so-called "private attorney general" cases. Respondents do not assert that the results reached in the particular circumstances of all these cases were necessarily correct. But the factors which underlie many of these fee awards reflect the same considerations which guided the court below.

In particular, these lower federal courts, which have a day-to-day working knowledge of the realities of litigation, have found that there are substantial economic obstacles to certain private litigation which vindicates Congressional policies and confers benefits on others beside the litigant. They have recognized that fee awards may be appropriate in such

[10] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970) (Clean Air Amendments); S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971) (Federal Water Pollution Control Act Amendments).

cases because, without the prospect of recovering fee awards, worthy and productive litigation may be unjustifiably discouraged." [11]

[11] Leading cases in the courts of appeals which have followed a private attorney general theory in making a fee award include: *Knight* v. *Auciello*, 453 F.2d 852 (1st Cir. 1972) (fee awarded in Section 1982 civil rights case to "remove the burden from the shoulders of the plaintiff seeking to vindicate the public right"); *Hoitt* v. *Vitek*, 495 F.2d 219 (1st Cir. 1974) (fee awarded in Section 1983 prisoner rights case "to encourage important policy enforcement"); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971) (fee awarded in Section 1982 civil rights case "[t]o ensure that individual litigants are willing to act as 'private attorneys general' to effectuate the public purposes of the statute"); *Cooper* v. *Allen*, 467 F.2d 836 (5th Cir. 1972) (fee may be awarded in Section 1981 civil rights case for the reasons discussed in *Lee*, *supra*); *Fairley* v. *Patterson*, 493 F.2d 598 (5th Cir. 1974) (fee awarded in Fourteenth Amendment reapportionment case where "private plaintiffs have aided in effectuating important congressional and public policies"); *Cornist* v. *Richland Parish School Bd.*, 495 F.2d 189 (5th Cir. 1974) (fee awarded in Section 1983 civil rights case where plaintiffs' attorneys "benefited not only [plaintiffs] but all the black teachers in the Parish as well as the school system as a whole by virtue of the system's being brought into compliance with federal law and Congressional policy"); *Taylor* v. *Perini*, 503 F.2d 899 (6th Cir. 1974) (on authority of *Wilderness Society II*, fee may be awarded in Section 1983 prisoner rights case "where there is no potential substantial award of damages and where the cost of supporting a case for injunctive relief is high" because such an award "serves to prevent the unjust discouragement of parties in bringing suit to vindicate important rights"); *Donahue* v. *Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973) (fee awarded in Section 1983 free speech case because the "relative financial positions of the parties" were disparate and the "benefit to the general public . . . is substantial in

III. THE EQUITABLE FACTORS PRESENT IN THIS CASE SUPPORT A SHIFTING OF RESPONDENTS' FEES TO ALYESKA.

Having concluded, for the reasons set forth in Point II, *supra*, that respondents and their counsel

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this case and should not depend for its protection upon the financial status of the individual" deprived of his rights); *Fowler* v. *Schwarzwalder*, 498 F.2d 143 (8th Cir. 1974) (fee may be awarded in Sections 1981 and 1983 civil rights case since "absent compelling circumstances," a "'private attorney general' . . . seeking to vindicate Congressional policy of the highest priority and advance the public interest should not be forced to bear the costs of litigation"); *Brandenberger* v. *Thompson*, 494 F.2d 885 (9th Cir. 1974) (fee awarded in Section 1983 right to travel/welfare case because plaintiff "benefitted a significant class," "vindicated [a] federally protected right," had an insufficient monetary interest "to provide an incentive to bring the suit," and could not rely upon the state attorney general to protect her right); *cf. Stolberg* v. *Members of Bd. of Trustees for State Colleges*, 474 F.2d 485 (2d Cir. 1973) (fee awarded in Section 1983 case not because "defendants should suffer pecuniary punishment," but rather "to assure that the plaintiff, and others who might similarly be forced to great expense to vindicate clear constitutional claims, are not deterred from securing such vindication by the prospect of costly, protracted proceedings which have become necessary only because of the obdurate conduct of the defendants").

Apparently, only the Fourth Circuit has rejected this approach, *Bradley* v. *Richmond School Bd.*, 472 F.2d 318 (1972), and that decision was reversed by this Court on other grounds, 416 U.S. 696 (1974). Recently in *Sierra Club* v. *Lynn*, 502 F.2d 43 (1974), the Fifth Circuit reaffirmed the private attorney general rationale but declined to apply it. *See* pp. 78-80 *infra*.

District court cases include the following: *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972) (fees awarded in Section 1983 reapportionment suit "to

should not be required to bear the entire burden of this litigation, the court determined that, as between respondents and Alyeska, the equities of this case supported a shift of at least part of respondents' fees

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eliminate [financial] impediments to *pro bono publico* litigation" which benefitted plaintiffs' class and effectuated a strong congressional policy); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972) (fee awarded in environmental protection and housing assistance case brought under the Department of Transportation Act of 1966 and various federal housing statutes, because of "the strength of the Congressional policy, the number of people benefitted by the litigants' efforts, and the necessity and financial burden of private enforcement"); *Lyle* v. *Teresi*, 327 F. Supp. 683 (D. Minn. 1971) (fee awarded in Section 1983 civil rights case "to encourage individuals injured by racial discrimination to seek judicial relief"); *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974) (fee awarded in Section 1983 civil rights case because "the benefit accruing to plaintiffs' class is substantial and important," because plaintiffs "promoted the purposes of congressional legislation," and because such cases usually require "substantial financial sacrifices" and may cause the lawyer to suffer "community ostracism"); *Harper* v. *Mayor and City Council*, 359 F. Supp. 1187 (D. Md. 1973) (fee awarded in civil rights case brought under several statutes because "[p]laintiffs have effectuated a strong congressional policy by maintaining this suit"); *Incarcerated Men* v. *Fair*, 376 F. Supp. 483 (N.D. Ohio 1973) (fee awarded in Section 1983 prisoner rights case to "assure that the vindication of public constitutional rights need not depend upon the financial resources of the particular individuals who seek to secure those rights"); *Newman* v. *Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972) (fee awarded in case vindicating prisoners' constitutional rights because plaintiffs "benefited substantially a large class of others in the same manner as they have benefited themselves"); *Wyatt* v. *Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *appeal pending* (fee awarded in suit vindicating mental patients' right to treatment because

to Alyeska. *Wilderness Society II*, 495 F.2d at 1036. The court clearly stated in its opinion that its decision to shift a portion of respondents' fees to Alyeska

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the expenses "incurred in vindicating the public good were considerable," the litigation benefited large numbers of people, and fee shifting is necessary "in order to eliminate the impediments to *pro bono publico* litigation"); *Jinks* v. *Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972) (fee awarded in Section 1983 employment rights/maternity leave case since a "substantial and important" benefit was conferred upon a class and "such litigation must be encouraged to vindicate the federal rights of our citizens"); *Stanford Daily* v. *Zurcher*, 366 F. Supp. 18 (N.D. Cal. 1973) (fee awarded in Section 1983 search and seizure case because "no remedial action can be expected from public officials," "fee shifting is necessary to insure the vindication of important constitutional rights," "because it is consistent with a remedy increasingly furnished by Congress, and because of the high social value placed upon the rights involved"); *Brown* v. *Ballas*, 331 F. Supp. 1033 (N.D. Tex. 1971) (fee awarded in housing discrimination case brought under the Fair Housing Act and Section 1982 since "much of the elimination of unlawful racial discrimination devolves upon private litigants and their attorneys"); *Ross* v. *Goshi*, 351 F. Supp. 949 (D. Hawaii 1972) (fee award in Section 1983 free speech case because "the only practicable means of enforcing section 1983 is by private parties," because "private parties are least able to bear the cost of vindicating constitutional rights"); *Thonen* v. *Jenkins*, 374 F. Supp. 134 (E.D.N.C. 1974) (fee awarded in Section 1983 free speech case to "encourage" vindication of constitutional rights); *Kirkland* v. *New York Dept. of Correct. Serv.*, 374 F. Supp. 1361 (S.D.N.Y. 1974) (fee awarded in employment discrimination case brought under various constitutional and statutory provisions, applying the factors set forth in *La Raza Unida*, *supra*); *Scott* v. *Opelika City Schools*, 63 F.R.D. 144 (M.D. Ala. 1974) (fee awarded in Section 1983 sex discrimination case which "effectuate[d] a strong Congressional policy"); *Palmer* v. *Columbia Gas Inc.*, 375 F. Supp. 634 (N.D.

was not intended to punish Alyeska as a law violator or as a wrongdoer. *Ibid.*

Alyeska argues that the Mineral Leasing Act and NEPA imposed no legal obligation upon it and that therefore no fees can be awarded against it as a matter of law. P. Br. 16-23. As a technical matter, Section 28 of the Mineral Leasing Act did impose an enforceable legal obligation on Alyeska to observe all of the provisions of the section under pain of forfeiture of any right-of-way that might be granted. See pp. 82-83 *infra*. Far more significantly, however, Alyeska's conclusion that a violation of a legal obligation is a prerequisite for a fee award is simply wrong. Courts of equity frequently award fees against persons who have not violated any legal obligation. In common benefit cases, for example, the

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Ohio 1974) (fee awarded in Section 1983 case challenging public utility termination procedures because case "substantially benefited" present and future customers and because the award "assures that the vindication of constitutional rights need not depend upon the financial resources of the particular individuals who seek to secure those rights"); *Calnetics Corp* v. *Volkswagen of America, Inc.*, 353 F. Supp. 1219 (C.D. Cal. 1973) (fee awarded in private antitrust suit seeking only injunctive relief since plaintiff vindicated "a policy of compelling national economic interest" and produced benefits "not only for itself but for all competitors", and because private actions are necessary to assure enforcement of the antitrust laws).

See generally cases collected in Derfner, *Attorneys' Fees in Pro Bono Publico Cases*, reprinted in *Hearings on The Effect of Legal Fees on The Adequacy of Representation Before the Subcomm. on Representation of Citizen Interests of the Senate Judiciary Comm.*, 93d Cong., 1st Sess., pts. 3 and 4, at 862 (1973).

fee award is paid by beneficiaries of the litigation—and sometimes even non-beneficiaries—who violated no legal obligations.[92] Thus, the court of appeals clearly had the power to require Alyeska to pay fees in this case if, under all the circumstances, the equities justify such an award. As demonstrated below, they clearly do.

The Trans-Alaska Pipeline was Alyeska's project. The litigation resulted from actions and decisions for which Alyeska was directly responsible (and, in the case of the Mineral Leasing Act, legally liable). Alyeska was a real party in interest and took a lead role in the litigation to protect those interests. Alyeska received direct benefits from the litigation and is in a position to shift the award to beneficiaries of other benefits identified in the court's decision. The

[92] As Justice Harlan explained:

> "This Court in *Sprague* upheld the District Court's power to grant reimbursement for a plaintiff's litigation expenses even though she had sued only on her own behalf and not for a class, because her success would have a *stare decisis* effect entitling others to recover out of specific assets of the same defendant. *Although those others were not parties before the court, they could be forced to contribute to the costs of the suit by an order reimbursing the plaintiff from the defendant's assets out of which their later recovery would have to come." Mills*, 396 U.S. at 393. (Emphasis supplied.)

In the *Sprague* litigation even some non-beneficiaries were required to pay fees. See p. 37 *supra*. *See also* the discussion of *Mills*, p. 81 n. 103 *infra*.

Alyeska's argument that it had "no control" over the governmental decision-making, P. Br. 21, is simply a corollary of its argument that it had no legal obligation and is not dispositive for the same reason.

award of fees works no hardship on Alyeska and will not deter others similarly situated. And, finally, the court's decision not to award fees against the other defendants worked no hardship or unfairness on Alyeska.

A. The Litigation Stemmed from Actions and Decisions for Which Alyeska Was Directly Responsible

As was consistently emphasized by Secretary Morton and other Interior Department officials throughout the proceedings below, the Trans-Alaska Pipeline is a private project.[93] The pipeline was conceived by and is intended to promote the economic interests of Alyeska's principals. It was Alyeska's principals that decided to take their product to market over lands

[93] *See, e.g.*, Statement of then Under Secretary Train, *Hearings Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess., pt. 2, 124 (Oct. 16, 1969) ("the private sector, at least, has made a decision that this is an important resource that it expects to develop and this has been a traditional way in which such decisions have been made in this country"); Statement by Secretary Morton, *Hearings on S. 35, S. 845 and S. 1571 Before the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess., pt. 2, at 454, 456 (April 20, 1971) ("the scope of our work here is to deal with the applications on our desk") ("this is their money and this is their project"); Statement by Secretary Morton, *Oversight Hearings on the National Environmental Policy Act and Its Implementation Before the Senate Comms. on Public Work and Interior and Insular Affairs*, 92d Cong., 1st Sess. 404 (March 9, 1972) ("we have to remember this is not a Government project"); Statement of (then) Under Secretary Pecora, Press Conference, March 20, 1972, 9-10 (P. Docs. III, Tab B) (R. 207) ("The Department has before it at the present time only one application and this is an application from Prudhoe Bay to Valdez, and that is the application on which action will be taken.").

owned by the Federal Government. It was also Alyeska's principals that then decided to address their request for rights-of-way to the Secretary of the Interior rather than to Congress.

The decision to bypass Congress was made in the first instance by Alyeska's principals, *not* by the Secretary. When Alyeska addressed its application to the Secretary rather than to Congress, it did so with an awareness that the right-of-way allowed by statute was not adequate for the pipeline they proposed [94] and without reliance on any published regulation or other "expressly articulated position at the administrative level." *Wilderness Society I*, 479 F.2d at 868.[95] Alyeska was free at any time to change its decision and address its request to Congress, but it declined to do so even after receiving a clear signal from the preliminary injunction.

At the time *Wilderness Society I* was decided, all seven judges on the court below recognized Alyeska's clear responsibility for the decision to bypass Congress and for the litigation spawned by that decision:

[94] *See* p. 8 *supra*.

[95] *See* p. 25 n. 39 *supra*. In this respect, the instant case is clearly distinguishable from *Committee To Stop Route 7 v. Volpe*, 4 ERC 1681 (D. Conn. 1972), cited at P. Br. 22, where the court expressly found:

> "The state agency simply relied upon a federal regulation . . . In these circumstances, it would not be appropriate to impose attorney's fees as a cost against the state, when the federal agency made the erroneous decision which led to the plaintiffs' judgment." *Id.* at 1682.

> "Congress . . . *allowed pipeline companies* to use a certain amount of land to construct *their* pipelines. *These companies* have now come into *court*, . . . and have said, 'This is not enough land; give us more.' We have no . . . power to grant *their* request . . . . (Emphasis added). 479 F.2d at 891.
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> "I recognize that *Alyeska* must now go to Congress for an amendment to a law that never contemplated that a pipeline of this magnitude would be required to be built under the harsh conditions of soil and climate that exist in Alaska. That is regrettable . . . , but it is Congress that has the legislative power not this court." (Emphasis added). (Separate opinion of MacKinnon, J.). 479 F.2d at 905.
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> "Regrettably, the *would-be builders* of the Alaska Pipeline sought from the courts rather than the Congress clearly necessary changes in the statutory restriction on the use of public lands." (Emphasis added). (Separate opinion of Wilkey, J.). 479 F.2d at 912.

Similarly, insofar as compliance with NEPA's policies is concerned, Alyeska as the proponent of the project bore a responsibility to attend to its environmental consequences. Indeed, the regulations and guidelines adopted by the Department of Interior and other agencies to implement NEPA recognize that where NEPA is applied to private projects requiring federal authorization, the responsibility for the initial analysis of environmental consequences often rests

with the private application.[90] As has been discussed above, both at the time of its original application, and for a substantial period thereafter, Alyeska was unprepared for the undertaking it espoused. This unpreparedness was a direct causative factor of the litigation.

All of this is not to say that Alyeska should be "punished" for any of the actions described above. But it does refute the inaccurate impression Alyeska seeks to convey in its brief that it was somehow a mere bystander to the events that led to the initiation of this litigation in March 1970 and to the court's decision in *Wilderness Society I*. See P. Br. 16-23.[91]

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[90] *See, e.g.*, Interior Dept. Regs. part 516, ch. 2.9(F)(2); Atomic Energy Commission, 39 Fed. Reg. 26279, §§ 51.20, 51.21 (July 18, 1974); Law Enforcement Assistance Administration, 28 C.F.R. §§ 19.9(b)(2), (b)(5), (c); Department of Agriculture: Rural Electrification Administration, 39 Fed. Reg. 23240, § V(D)(2) (June 27, 1974); Department of Transportation, 39 Fed. Reg. 35234, § 7(e) (Sept. 30, 1974); Council of Environmental Quality, 40 C.F.R., ch. V, § 1500.7(c). To recognize Alyeska's responsibility in this regard by no means derogates the non-delegable legal duty of the Secretary to make his own evaluation of environmental issues and to take responsibility for the scope and content of draft and final environmental statements. *See Greene County Planning Bd.* v. *FPC*, 455 F.2d 412, 420 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

[91] The court's conclusion that Alyeska's responsibility for the project in question and for the events that led to the litigation is a relevant consideration in determining where the equities lie as between Alyeska and respondents is grounded on solid equitable principles. *See, e.g., Pompton* v. *Cooper Union*, 101 U.S. 196, 204 (1879) ("Where one of two innocent persons must suffer a loss, and one of them contributed to produce it, the law throws the burden on him and not upon the other party"). *See also National Safe Deposit, Sav. & Trust Co.* v. *Hibbs*, 229 U.S. 391, 394 (1913); *Hill* v. *Flota Mercante Grancolombiana, S. A.*, 267 F. Supp. 380, 384 (E.D. La. 1967), *aff'd*, 405 F. 2d 878 (5th Cir.), *cert. denied*, 395 U.S. 934 (1969); *Winchell* v. *Moffat County State Bank*, 307 F.2d 280, 282 (10th Cir. 1962); *Henry* v. *Auchincloss, Parker & Redpath*, 305 F.2d 753, 754 (D.C. Cir. 1962); *James Talbott, Inc.* v. *Associates Discount Corp.*, 302 F. 2d 443, 446-47 (8th Cir. 1962) (Blackmun, J.); *Whitehead* v. *American Secur. & Trust Co.*, 285 F.2d 282, 284 (D.C. Cir. 1960); *Ryan* v. *Spaniol*, 193 F.2d 551, 553 (10th Cir. 1951).

B. Alyeska Was a Real Party in Interest and Took an Active Role in the Litigation

Alyeska did not merely contribute indirectly to the litigation by actions and decisions taken by its principals outside the courtroom. As the court of appeals noted, "after successfully persuading the Interior Department to grant the rights-of-way, Alyeska intervened in the litigation to protect its massive interests." *Wilderness Society II*, 495 F.2d at 1036.

Alyeska's intervention was premised on the recognition that as a private party it had "a greater interest than the Secretary of the Interior in advancing arguments in support of the Secretary's authority to issue the necessary rights-of-way and permits."[92] Once in the litigation, Alyeska played a vigorous and independent role in furthering and protecting those interests. Alyeska made extensive discovery demands on respondents and filed motions and memoranda on a broad variety of procedural matters. When respondents requested that the district court consider the Mineral Leasing Act issues as threshold questions,

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[92] *See* p. 16 *supra*.

it was Alyeska, later joined by the other defendants (see, *e.g.*, Jt. App. 153), that insisted that all issues be heard together. Alyeska then filed hundreds of pages of printed briefs and took the major portion of the oral argument in both the district court and the court of appeals.

In considering Alyeska's "major and real" role in the litigation and the fact that Alyeska required respondents "to brief and argue an issue which, because of their very success on the Mineral Leasing Act issue, never became ripe for adjudication," [9] the court of appeals was in no sense punishing Alyeska for having intervened in the litigation or for having vigorously pursued its own interests. Rather, the court was simply recognizing that just as Alyeska was not a mere bystander in the events which led to this litigation, Alyeska was not a mere bystander in the litigation itself.

C. Alyeska Received Direct Benefits from the Litigation and Is in a Position to Shift the Award to Other Beneficiaries of the Litigation

The opinion of the Fifth Circuit in *Sierra Club* v. *Lynn*, 502 F.2d 43 (1974), cited extensively in petitioner's brief, highlights two additional factors that lend further support to the fairness of the decision to shift fees from respondents to Alyeska.

In *Sierra Club* v. *Lynn*, the Department of Housing and Urban Development approved federal funding for a new town to be constructed by a private developer astride "Edwards Aquifer, an underground water-bearing formation that is the sole water supply

[9] *Wilderness Society II*, 495 F.2d at 1035.

for the City of San Antonio and 1,000,000 area residents." 502 F.2d at 48. Litigation was instituted by private citizens alleging, among other grounds, that the environmental impact statement prepared by HUD did not comply with NEPA's provisions in that it did not adequately consider the impact of the project on the City of San Antonio and the 1,000,000 area residents who were dependent on Edwards Aquifer for their water supply. The district court subsequently awarded fees to plaintiffs for their litigation efforts that were deemed by that court to have "advanced the public interest by ensuring that adequate precautions would be taken to protect the aquifer." *Id.* at 64.

In overruling that award the court of appeals emphasized that "none of the benefits of this litigation cited by the district court have inured, except in the abstract, to the developer." *Ibid.* In the instant case at least some of the benefits of the litigation—*i.e.*, those that protect the physical integrity of the pipeline—confer direct and concrete economic benefits on Alyeska and its principals.

Of greater relevance, however, is the conclusion of the Fifth Circuit that even if the developer in *Sierra Club* v. *Lynn* had received no concrete benefit from the litigation, an award of fees against it would have been proper if the developer were in a position to distribute the award among the beneficiaries of the action. As the court explained:

> "*The common benefit rationale could justify an award against a* public agency or *private entity which would be able to shift the costs in common to the members of the public who draw their*

> *water from the Edwards Aquifer.* Clearly, the developer is not in a position to distribute the costs of this litigation to the one million residents of the San Antonio area who will benefit from the preservation of this water source." (Emphasis added.) *Id.* at 65.

In marked contrast, Alyeska's principals are in an excellent position to distribute the fee award among the ultimate beneficiaries of this litigation—the oil-consuming public, whom the litigation benefitted by protecting the physical integrity of the pipeline, and the general public whom the litigation benefitted by protecting both the environment and "the proper functioning of our system of government." *Wilderness Society II*, 495 F.2d at 1033.[100] The seven beneficial owners of Alyeska do business collectively in 49 states plus the District of Columbia and account

[100] When the court below asserted that "imposing attorneys' fees on Alyeska will not serve to spread the costs of litigation proportionately," *Wilderness Society II*, 495 F.2d at 1029, it did not have the benefit of the Fifth Circuit's analysis in *Sierra Club* v. *Lynn*.

The factual differences between *Sierra Club* v. *Lynn* and *Wilderness Society II* render the cases distinguishable. But insofar as *Sierra Club* v. *Lynn* can be construed as a holding that the presence of a direct legally enforceable obligation is an absolute prerequisite to an award of fees, it is both factually distinguishable from the instant case (*see* pp. 82-83 *infra*) and is inconsistent with long-established equitable principles. *See* pp. 71-72, 76 n. 97 *supra*. The Fifth Circuit's conclusion that it would be unfair to award fees "in the absence of proof that the private parties controlled the government agency's action or caused its default," 502 F.2d at 66, may be applicable to the facts of that case. However, it is clearly not correct as a general proposition, as the facts of the instant case demonstrate. *See also* p. 72 n. 92 *supra*.

for over twenty percent of the national market in gasoline sales.[101] Under the provisions of Pub. L. No. 93-153 those companies are already obligated to "reimburse the United States for administrative and other costs incurred in processing the application," Section 28(1)—including the cost of the various environmental undertakings by the Interior Department which, at last estimate, exceed nine million dollars.[102] Those costs will, of course, be distributed by the companies to their customers. The marginal increment represented by the fee award in this case can be similarly distributed. While Alyeska's principals can spread the fee among their customers only and not among all persons who have benefitted, this spreading mechanism is no more imperfect than other mechanisms approved by this Court and numerous lower courts in other contexts.[103]

[101] 1974 *National Petroleum News Factbook* 109, 111-122.

[102] Supporting documents, Vol. 4, Tab 26, and Vol. 5, Tab 9 (R. 230).

[103] The imperfection of the fee-shifting mechanism in *Sprague*, where even non-beneficiaries were required to pay fees, is discussed at p. 37 *supra*. *Mills* is even closer to the present case. There the court suggested that there were two classes of beneficiaries, the stockholders of the corporation which sent out unlawful proxies and "all shareholders." This Court permitted fees to be awarded against a "successor corporation" whose shareholders were not coextensive with those in the corporation which sent out the unlawful proxies, and, of course, not coextensive with "all shareholders" throughout the country. In short, the court was willing to permit an award against some ultimate beneficiaries when other beneficiaries were not required to pay—precisely the situation in the present case.

Lower courts have also adopted imperfect machanisms for spreading costs. *See, e.g., Brewer* v. *Norfolk School Bd.*,

D. The Mineral Leasing Act Imposed a Direct Legal Obligation on Alyeska

Respondents contend that in light of the factors summarized above, fees can be awarded against Alyeska even if no legal obligation was imposed upon Alyeska by the Mineral Leasing Act and NEPA. But to the extent that the existence of such an obligation may be considered a factor in determining the fairness of an award of fees against a party, it too is present in this case. Section 28 of the Mineral Leasing Act explicitly provided that:

> "*Failure to comply with the provisions of this section* or the regulations and conditions pre-

456 F.2d 933 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972) (in a desegregation case which secured free busing for some students, the "only feasible solution in this particular situation" was to shift fees to the school board, and ultimately to all taxpayers contributing to the school board's funds, even though the only beneficiaries were those children receiving free school busing); *Callahan* v. *Wallace*, 466 F.2d 59 (5th Cir. 1972) (in a case forbidding justices of the peace from trying traffic cases in which they have a pecuniary interest, fees were shifted to the state, and ultimately to all taxpayers, even though the only beneficiaries were certain driving members of the public); *Newman* v. *Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972) (in a prisoner rights case, fees shifted to state, and ultimately to all taxpayers, even though the only beneficiaries were state prison inmates); *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972) (in a reapportionment case, fees shifted to state, and ultimately to all taxpayers, even though beneficiaries were only those voters previously underrepresented in the legislature); *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974) (in an employment discrimination case, fees shifted to state, and ultimately to all taxpayers, even though the only direct beneficiaries were black applicants to the state police force).

> scribed by the Secretary of the Interior *shall be ground for forfeiture of the grant by the United States District Court* for the District in which the property, or some part thereof, is located in an appropriate proceeding." (Emphasis added).

Thus, on the face of the statute, compliance with the provisions of the Mineral Leasing Act, including its width limitations, was not merely an obligation of the Secretary's. Such compliance could be enforced directly against Alyeska by an action taken to forfeit any grant that might be issued which did not "comply with the provisions of this section." [194]

E. The Award of Fees Works No Hardship on Alyeska

The court of appeals also properly considered whether an award against Alyeska would deter Alyeska or others similarly situated from pursuing their interests in court. *Wilderness Society II*, 495 F.2d at 1032, 1036. It was for this limited purpose only that the court examined the financial stake of Alyeska and its principals in the litigation.[195]

The Supreme Court employed a similar approach in *Hall* v. *Cole*. There petitioners contended that "the

[194] *Compare Denver Petroleum Corp.* v. *Shell Oil Corp.*, 306 F. Supp. 289, 303 (D. Colo. 1969) which construed the common carrier provision of Section 28. ("No administrative office or agency is entitled to exempt crude oil pipelines from the provisions of Section 28 of the Mineral Leasing Act.").

[195] There is thus no basis for the suggestion that the real premise of the court's opinion is "oil companies are prosperous, [respondents] are poor, and therefore the oil companies should finance both sides of this litigation." *Wilderness Society II*, 495 F.2d at 1042 (MacKinnon, J., dissenting), quoted at P. Br. 9. And the court's conclusion that Alyeska would not be deterred by an award of fees was obviously correct.

payment of counsel fees out of the union treasury might deplete union funds to such an extent as to impair the union's ability to operate as an effective collective bargaining agent and to endanger union stability." 412 U.S. at 9 n.13. The Court agreed that "this consideration is undoubtedly an important one." The Court stated, however, that it is "relevant, not to the *power* of federal courts to award counsel fees generally, but, rather, to the exercise of the District Court's discretion on a case-by-case basis." *Ibid.* (Emphasis in original.) Then, the Supreme Court, like the court of appeals here, looked at the specific facts of the case and concluded that "petitioners do not, and indeed cannot, contend that the award of only $5,000 would in any sense jeopardize union stability." 412 U.S. at 15 n.23.

F. Alyeska Was Not Prejudiced by the Lack of an Award Against the Other Defendants

Respondents in the court of appeals sought to recover attorneys' fees only from Alyeska and not from the State of Alaska or the Federal Government. The court of appeals taxed only Alyeska, but limited its award against Alyeska to one half of the fees requested. The court's decision was clearly within its equitable discretion and did not prejudice Alyeska.

The court concluded that it was "inappropriate" to tax the State of Alaska. The court's distinction between the State of Alaska and Alyeska is eminently sound. Unlike Alyeska, the State of Alaska did not initiate the project at issue, did not play a major role in the litigation and, following the analysis of *Sierra Club* v. *Lynn*, could not shift the cost of the litiga-

tion to a substantial number of those who benefitted from the litigation.

The court of appeals found that 28 U.S.C. § 2412 barred a fee award against the Federal Government. Accordingly, it concluded:

> "In recognition of the Government's role in the case . . . Alyeska should have to bear only half of the total fees. The other half is properly allocated to the Government and, because of the statutory bar, must be assumed by appellants. In this manner the equitable principle that appellees bear their fair share of this litigation's full costs and the congressional policy that the United States not be taxable for fees can be accommodated." *Wilderness Society II*, 495 F.2d at 1036.

Alyeska argues that if fees are barred against the Government, *a fortiori* they are barred against Alyeska. P. Br. 23. But for the reasons advanced above there is nothing *a fortiori* about it. Moreover, Alyeska's argument overlooks the holdings of this Court that a congressional statute does not bar attorneys' fees unless it "meticulously detail[s] the remedies available to a plaintiff" [106] or otherwise evidences a "purpose to circumscribe the court's power to grant appropriate remedies." [107] The general language of Section 2412 is simply not specific enough to deny a court of equity the power to award fees to respondents in this case since the comprehensiveness of:

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[106] *Hall* v. *Cole*, 412 U.S. at 9-10, quoting *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. at 719.

[107] *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 391.

> "[E]quitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." [108]

Respondents do not challenge the court's decision to shift only half of the fees in issue to Alyeska. But respondents submit that in light of the factors described above, it would have been equitable for the court to have taxed the entire award against Alyeska. Indeed, it would have been equitable for the court to have shifted the entire award to Alyeska *even if it found no statutory bar against shifting a portion of respondents' fees to the Federal Government*. For, as noted above, there is a strong congressional policy—specifically reaffirmed in Pub. L. No. 93-153—in favor of requiring the applicant rather than the Government to pay the transaction costs involved in obtaining pipeline rights-of-way.

In short, by shifting to Alyeska only half the fees in issue, the court of appeals bent over backwards to assure that Alyeska was not prejudiced by the absence of any award against the Government. This exercise of the court's equitable discretion is further evidence of the court's judicious effort to fashion an equitable fee shifting mechanism that would not be unfair to Alyeska.

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[108] *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946).

IV. ALYESKA'S OTHER ARGUMENTS AGAINST THE AWARD OF FEES IN THIS CASE LACK MERIT.

Alyeska's Brief contains a number of other arguments against the award of attorneys' fees in this case. These arguments are refuted by the facts of this case and by judicial precedent.

A. Alyeska's Arguments About "Success" Do Not Apply To The Facts Of This Case And Do Not Provide A Useful Guide For Other Cases

Alyeska argues that fees should not be awarded to a party unless it "successfully litigates" the issue to a formal victory.[109] The inappropriateness of the rigid "success" requirement that Alyeska would impose on the equitable power to award fees is illustrated by the facts of this case. In every sense of the word, respondents were the successful party in *Wilderness Society I*. Through its decision on the Mineral Leasing Act issues, the court of appeals enjoined construction of the pipeline, thereby granting respondents all the relief that they sought and, indeed, all the relief that a court properly could have granted.

Respondents neither "won" nor "lost" on the NEPA issues, which never became ripe for adjudication because of respondents' "very success on the Mineral Leasing Act issues." [110] However, for at least three reasons it was appropriate for the court to award fees to respondents for their work on these non-

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[109] *See* P. Br. 33 *et seq.*

[110] *Wilderness Society II*, 495 F.2d at 1035. Alyeska's suggestion that it "prevailed" on the NEPA issues is inexplicable. P. Br. 33.

"winning" issues. *First*, the NEPA issues were briefed and argued because Alyeska insisted that they were necessary for an informed decision on the Mineral Leasing Act issues. See pp. 19-20 *supra*. *Second*, the exposition of the NEPA issues was found by the court of appeals to be helpful for an informed decision on the Mineral Leasing Act issues. *Wilderness Society II*, 495 F.2d at 1035. *Third*, respondents' litigation effectuated the policies of NEPA by forcing both government and industry to pay careful attention to the pipeline's environmental and technological hazards and thereby to reduce the project's risks. See pp. 45-50 *supra*.

More generally, Alyeska's formalistic "success" rule would impose on the equitable power of federal courts an artificial standard that ignores the realities of litigation.[111] As the Court recognized in *Sprague*,

[111] As the court of appeals for the District of Columbia Circuit has asserted in another context:

> "As all lawyers know, a lawsuit does not always have to go to final adjudication on the merits in order to be effective. Assuming the effectiveness in terms of practical results, the litigation stage attained is relevant only to the amount of the fees to be allowed, and not to the issue of whether they should be awarded at all." *Yablonski* v. *United Mine Workers of America*, 466 F.2d 424, 431 (1972), *cert. denied*, 412 U.S. 918 (1973).

See also Fairley v. *Patterson*, 493 F.2d 598, 604 (5th Cir. 1974) (to require formal victory "would be to ignore the reality of this litigation"); *cf. Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 396 (the advancement of important legislative policy justifying a fee award can be accomplished even where a party does not obtain the ultimate relief sought by the filing and prosecution of the suit).

In the analogous area of costs, the "prevailing party" normally recovers costs on all litigated issues as a matter of course. *See, e.g.*, U.S. Sup. Ct. R. 57 (1970); 28 U.S.C. § 2412; Fed. R. Civ. P. 54(d); *Esso Standard (Libya), Inc.* v. *S.S. Wisconsin*, 54 F.R.D. 26, 27 (S.D. Tex. 1971). There is no requirement that the party prevail on each and every issue. *See, e.g., Mashak* v. *Hacken*, 303 F.2d 526, 527 (7th Cir. 1962); *Howerton* v. *Mississippi County*, 361 F. Supp. 356, 360 n.2 (E.D. Ark. 1973); *Oster* v. *Rubinstein*, 142 F. Supp. 620, 621 (S.D.N.Y. 1956); 6 *Moore's Federal Practice* ¶ 54.70 [4] at 1306 (1972). Indeed, costs are awarded to "prevailing parties" even for issues on which they lose. *See, e.g., Hines* v. *Perez*, 242 F.2d 459, 466 (9th Cir. 1957); *Best Medium Pub. Co.* v. *Nat's Insider, Inc.*, 385 F.2d 384, 386 (7th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968); *Lewis* v. *Pennington*, 400 F.2d 806, 820 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968). And there is clear precedent in the cost area for awarding costs against the party responsible for the litigation of issues that need not be adjudicated for a resolution of the case. *See, e.g., Textile Workers Union* v. *American Thread Co.*, 271 F.2d 277, 278 (4th Cir. 1959); *Switzer Bros., Inc.* v. *Chicago Cardboard Co.*, 252 F.2d 407, 412 (7th Cir. 1958); *Esso Standard (Libya) Inc.* v. *S.S. Wisconsin*, *supra*, 54 F.R.D. at 27; *Davy* v. *Faucner*, 84 F. Supp. 737, 738 (N.D. Fla. 1949).

"the formalities of . . . litigation . . . hardly touch the power of equity in doing justice." 307 U.S. at 167. In civil rights cases, in particular, lower courts have recognized that non-"winning" plaintiffs can make significant contributions to the enforcement of the law.[112] These courts have, accordingly, awarded fees in a variety of cases that would violate the Alyeska success formula.[113]

[112] Indeed, courts encourage parties to take steps which eliminate the need for formal adjudication.

[113] Many of these cases are collected in the Amicus Curiae brief that the Lawyers' Committee for Civil Rights Under Law has filed in this case. As demonstrated by the cases collected in the Lawyers' Committee brief, lower courts have awarded fees in civil rights cases where plaintiffs have won

A similar need for flexibility exists in environmental cases. Indeed, in recognition of the fact that environmental litigation often produces benefits without a formal court victory, Congress has specifically provided that a plaintiff may be awarded attorneys' fees under the Clean Air and the Federal Water Pollution Control Act Amendments *supra*, without achieving any formal "win." As stated in the Senate reports accompanying the pertinent Amendments to both of these Acts, fee awards to non-"winning" plaintiffs may be appropriate:

> ". . . in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." [114]

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only some of the relief they sought, *e.g.*, *Clark* v. *Board of Educ. of Little Rock School Dist.*, 449 F.2d 493 (8th Cir. 1971) (*en banc*), *cert. denied*, 405 U.S. 936 (1972); *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970), *cert. denied*, 401 U.S. 911 (1971); where defendants have changed the challenged practice without a formal adjudication of the claim or the suit has otherwise served as a catalyst for change, *e.g.*, *Parham* v. *Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *Hammond* v. *Housing Authority Urban Renewal Agency*, 328 F. Supp. 586 (D. Ore. 1971); and where the case has been settled, in one way or another, without an adjudication of liability, *e.g.*, *Blumenthal* v. *Lee Memorial Hospital*, No. H-70-C-5 (E.D. Ark., August 6, 1971); *Webb* v. *Baxley*, No. 3564-N (M.D. Ala., Jan. 18, 1973).

[114] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970) (Clean Air Amendments of 1970); S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971) (Federal Water Pollution Control Act Amendments of 1972).

Thus, the appropriate standard should be the one followed by the court below and recently adopted by the First Circuit, which rejected the rule Alyeska now proposes for the following reasons:

> "We are at liberty to consider not merely 'who won', but what benefits were conferred. The purpose of an award of costs is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals." [115]

Alyeska does not cite a single authority for the contrary position that it now asks this Court to adopt.

B. Alyeska's Objections to Fee Awards for Salaried Attorneys Lack Merit

Alyeska argues that no fees should be awarded in this case because respondents exist to preserve environmental values and their attorneys were salaried employees of organizations formed to provide groups such as respondents with litigation assistance. P. Br. 43-45. But Congress, this Court, and the lower courts have frequently authorized fee awards to lawyers who are salaried employees of such organizations, and Alyeska offers no persuasive reasons for departing from this settled practice now.

At the time Congress enacted the attorneys' fees provisions of the Civil Rights Act of 1964, § 204(b),

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[115] *Natural Resources Defense Council* v. *EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973). *Accord*, *e.g.*, *McEnteggart* v. *Cataldo*, 451 F.2d 1109 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972); *Blau* v. *Royette-Faberge, Inc.*, 389 F.2d 469 (2d Cir. 1968); *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973).

42 U.S.C. § 2000a-3(b), and subsequent civil rights legislation, many of the leading civil rights cases were being brought by the salaried attorneys of such organizations as the NAACP Legal Defense and Educational Fund.[116] Similarly, at the time Congress passed the attorneys' fees provision of the Clean Air and Federal Water Pollution Control Act Amendments, *supra*, many of the leading environmental cases were being brought by organizations such as respondents.[117] There is not a single indication that Congress wished to bar fee awards to salaried attorneys of such civil rights and environmental organizations or to treat them differently from other attorneys.

Nor has this Court ever suggested that salaried attorneys of non-profit organizations are ineligible for fee awards. Indeed, the case in which this Court firmly established the right of attorneys to obtain fees under the 1964 Civil Rights Act, *Newman* v. *Piggie Park Enterprises, Inc.*, *supra*, was brought by salaried attorneys of the NAACP Legal Defense

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[116] Prior to 1964, virtually every major civil rights case was litigated principally by salaried attorneys of a national organization. *See, e.g., Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

[117] Among the well-known environmental cases undertaken prior to Congress' enactment of the attorneys' fee provision of the Clean Air Act on December 31, 1970, were *Environmental Defense Fund* v. *Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *D.C. Fed'n of Civic Ass'ns, Inc.* v. *Volpe*, 434 F.2d 536 (D.C. Cir. 1970); *Scenic Hudson Preserv. Conf.* v. *PFC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

and Educational Fund. This Court has also upheld fee awards to Fund attorneys in *Northcross* v. *Memphis Board of Education* and *Bradley* v. *Richmond School Board*, *supra*.

Once it is determined that a fee award is proper under the court's equity power, there is no basis for distinguishing between statutory and non-statutory cases in awarding fees to salaried attorneys of non-profit organizations. And, in fact, lower federal courts have awarded fees to salaried attorneys of such organizations in a wide range of civil rights and poverty law cases where fees were not authorized by statute.[118]

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[118] *See, e.g., Fairley* v. *Patterson*, 493 F.2d 598 (5th Cir. 1974); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). In *Brandenburger* v. *Thompson*, 494 F.2d 885, 889 (1974), the Ninth Circuit recently asserted:

> "It is true that the prospect of attorneys' fees does not discourage the litigant from bringing a suit when legal representation is provided without charge. But the entity providing the free legal services will be so discouraged, and an award of attorneys' fees encourages it to bring public-minded suits when so requested by litigants who are unable to pay. Thus, an award of attorneys' fees to the organizations providing free legal services indirectly serves the same purpose as an award directly to a fee paying litigant."

In *Hoitt* v. *Vitek*, 495 F.2d 219, 221 (1974), the First Circuit explained:

> "None of the legitimate reasons for the exercise of the court's equitable discretion turns on the nature of an individual attorney's normal means of reimbursement. These grounds for fee awards look to the past behavior of the parties and toward encouraging legal representatives in similar situations in the future. If the sole rep-

The reason that Congress and the courts have failed to seize upon the distinction suggested by Alyeska is obvious. A basic premise of fee awards, as *Newman* and *Hall* recognize, is that, despite the long tradition of the bar in providing legal services to the needy, litigation effectuating public policies cannot depend upon the charity of the private bar. Certainly, then, such litigation cannot depend upon the charity of lay donors who pay the salaries of the attorneys for non-profit organizations.[119]

The budgets of respondents and the Center for Law and Social Policy are similar to those of the

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resentatives of the plaintiffs below had been [New Hampshire Legal Assistance] and the district judge had reasoned, as he did, that the suit merited award under the "private attorney general" theory, we would find it difficult to discern the advancement of any legitimate policy by the denial of fees to NHLA."

[119] Nor should individuals and citizen groups with legitimate need for access to the courts be totally subject to the vagaries of foundation policies and portfolios. The Ford Foundation, for example, has announced that it will reduce its grants by over 50% over the next four years as a result of the stock market decline. N. Y. Times, Dec. 15, 1974, p. 1, col. 5.

In *La Raza Unida* v. *Volpe*, 57 F.R.D. at 98 n.6, the court concluded:

> "The fact that attorneys in this action, Public Advocates, Inc., require no fees from their clients or that they receive tax-exempt foundation money is not germane to their status as private attorneys general. *See Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970). We cannot presume Congress intended to rely on tax-exempt foundations to fund costs of litigation in order to effectuate its policies, nor that such funding will continue in the future."

leading civil rights organizations.[120] Their primary sources of funding—charitable contributions from foundations or private individuals—are similar and in many instances identical to those of civil rights organizations.[121] Their attorneys should be as eligible to obtain fee awards as the attorneys in *Newman*, *Bradley*, and *Lee* v. *Southern Home Sites*, *supra*.[122]

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[120] The annual operating budget of the NAACP Legal Defense and Educational Fund is $4.4 million. *Legal Defense Fund: A Report to the American People* 15 (1974). The annual operating budget of the Lawyers' Committee for Civil Rights Under Law is $1.9 million. *Ten-Year Report: Lawyers' Committee for Civil Rights Under Law* 116 (1973). The annual operating budget of The Wilderness Society, the largest of the respondent organizations, is $1.6 million. *The Wilderness Society: The Directors' Annual Report* 6 (1974). The annual operating budget of the Center for Law and Social Policy, which provided most of the legal manpower for this litigation, is $600,000.

[121] The Ford Foundation, for example, is the primary funder of the Center for Law and Social Policy and a major funder of respondent Environmental Defense Fund, the NAACP Legal Defense and Educational Fund and the Lawyers' Committee for Civil Rights Under Law. See *Ford Foundation: Annual Report* 10, 20-21, 36, 38-39, 69 (1973). The Rockefeller Brothers Fund is an important funder of the Center for Law and Social Policy, the NAACP Legal Defense and Educational Fund and the Lawyers' Committee for Civil Rights Under Law. See *Rockefeller Brothers Fund: Annual Report* 27, 46, 51 (1973).

[122] Alyeska did not raise below, and does not press here, the argument of the dissenting judges below that respondents' attorneys should receive no fee award because, in connection with a Motion to Change Venue (R. 67, 70, 75), they stated that they were representing respondents without fee. See P. Br. 44 n. 36; *Wilderness Society II*, 495 F.2d at 1044-46 (dissenting opinion). This point is adequately covered in *Wilderness Society II*, 495 F.2d at 1037 n.9.

C. In Making Its Award Of Fees In This Case The Court Of Appeals Relied On Judicially Manageable Factors

Alyeska suggests that the factors relied on by the court of appeals in this case cannot be properly evaluated by courts. This suggestion is, of course, refuted by the facts of this case, where the statutory interests involved were clearly important, where the benefits of the litigation are readily assessed, and where the burdens of a uniquely massive lawsuit are readily apparent. It is refuted as well by the actual experience of courts which have traditionally applied similar factors.

Courts frequently determine whether statutory interests are sufficiently important to justify the invocation of equitable remedies. Courts make this determination in common benefit attorneys' fees cases,[123] in cases implying a private right of action, and in cases implying a right to compensatory damages where the statute failed to provide any. *See* pp. 61-62 *supra*.[124] They are capable of making a

[123] *See, e.g., Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 396 ("the stress placed by Congress on the importance of fair and informed corporate sufferage"); *Hall* v. *Cole*, 412 U.S. at 8 ("the rights enumerated in Title I were deemed 'vital' ").

[124] Courts routinely assess the importance of statutory policies in a variety of other contexts involving the availability of equitable relief. *See, e.g., Boys Markets, Inc.* v. *Retail Clerks, Local 770*, 398 U.S. 235, 252 (1970), discussing *Brotherhood of R.R. Trainmen* v. *Chicago River & Ind. R.R.*, 353 U.S. 30 (1957) (equitable relief available because "an important federal policy was involved in the peaceful settlement of disputes through the statutorily mandated arbitration procedure"); *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 382 (1974) (equitable relief available because of "strong federal policy favoring arbitration of labor disputes"); *Bradley* v. *Richmond School Bd.*, 416 U.S. at 717 (1974) (application of existing law depends on nature of the parties and nature of the right), following *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) ("in great national concerns . . . the court must decide according to existing law").

similar determination in cases such as the present one.

Alyeska's speculation that the courts cannot evaluate the benefits conferred in a case where plaintiff does not technically "win" is refuted by the actual working experience of the lower courts. *See* pp. 88-90 *supra*. In addition, in common benefit cases this Court has experienced no difficulty determining that "others" benefited without determining that "others" have a legally winnable claim. *E.g., Hall* v. *Cole, supra*. Finally, Congress has recognized the courts' competence in this area by expressly providing that attorneys' fees can be awarded to non-prevailing parties. *See* Clean Air and Federal Water Pollution Control Act Amendments, *supra*.

Courts are also uniquely well-equipped to evaluate economic obstacles and the need for fee shifting on a case-by-case basis. The extent of the economic obstacles depends on the cost of the litigation and the possibility of economic benefit to the plaintiffs. The greater the cost of the litigation, the less likely it will be undertaken by plaintiffs who have no hope of economic benefit. Courts see first-hand the complexity, and hence costliness, of the specific case. And courts, through their knowledge of the nature

of the plaintiffs and the relief sought, can readily evaluate the possibility of economic benefit to the plaintiffs.

D. A Fee Award In This Case Will Not Lead To Frivolous Litigation

There is no basis for Alyeska's suggestion that the fee award in this case will encourage frivolous litigation. P. Br. 34. The fee award here rests upon the equities of a particular case—certainly one of the most important and complex environmental cases ever undertaken. The factors which supported a fee award here can provide frivolous litigants absolutely no encouragement whatsoever. For such litigants, the expense of litigation will remain a substantial if not overriding obstacle—as it should. See *Office of Communications of United Church of Christ* v. *FCC*, 359 F.2d 994, 1006 (D.C. Cir. 1966).

After this case, as before, equitable fee awards will be available only in exceptional lawsuits where overriding considerations make a fee award appropriate. As Justice Blackmun said in another context: "We need not fear that Pandora's box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past." *Sierra Club* v. *Morton*, *supra*, 405 U.S. at 758 (1972) (dissenting opinion). These words echo those of Mr. Justice Bradley almost a hundred years ago in the first Supreme Court case to consider the appropriateness of fee awards in "common fund" cases. Answering the argument that such awards would prove to be "excessive" in practice, Justice Bradley said:

> "[A] just respect for the eminent judges under whose direction many of these cases have been administered would lead to the conclusion that allowances of this kind, if made with moderation and a jealous regard to the rights of those who are interested . . . are not only admissible, but agreeable to the principles of equity and justice." *Trustees* v. *Greenough*, *supra*, 105 U.S. at 536-37.

A similar confidence in the federal judiciary is justified today.

E. The Fee Award Need Not Be Limited To The Salaries Earned By The Attorneys Involved

Alyeska also argues that any fees awarded in this case should be limited to the salaries earned by the attorneys involved. The court of appeals, on the other hand, stated that the "fee should represent the reasonable value of the services rendered, taking into account all the surrounding circumstances . . . ." *Wilderness Society II*, 495 F.2d at 1036. The court suggested several criteria which, in its view, should guide a determination of the size of the award.[135] The flexible position adopted by the court of appeals is undoubtedly sound.

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[135] The criteria set forth by the court were as follows:

> "The fee should represent the reasonable value of the services rendered, taking into account all the surrounding circumstances, including, but not limited to, the time and labor required on the case, the benefit to the public, the skill demanded by the novelty or complexity of the issues, and the incentive factor." *Id.* at 1036.

In this regard, the criteria listed in the court's opinion reflect the American Bar Association's *Code of Professional Responsibility D.R. 2-106.*

Alyeska seems to contend that an "unsalaried" attorney is entitled to a reasonable attorney's fee, taking into account all the circumstances of the case, while a salaried attorney presumptively is not. P. Br. 43. But as the court of appeals noted, "it may well be that counsel serve organizations like [respondents] for compensation below that obtainable in the market. . . . Litigation of this sort should not have to rely on the charity of counsel any more than it should rely on the charity of parties. . . ." *Wilderness Society II*, 495 F.2d at 1037. It is quite possible that the salaried attorney of an environmental or civil rights organization is making a greater financial sacrifice than the lawyer in private practice who takes on a single *pro bono* case.

Under Alyeska's reasoning the poorer the organization and the lower the salaries it can pay its attorneys, the smaller the attorneys' fees award, regardless of the extent and novelty of the litigation effort or the benefits conferred. Quite simply, that is unfair. There is no reason an award should be lower because an attorney is willing to work for a below-market salary.

Alyeska argues that "payment of a bonus to respondents' counsel on the theory that they have 'vindicated' a public policy in this case merely subsidizes other litigation which may or may not vindicate such a policy." P. Br. 45. But courts never control how an attorney spends his fee award. The attorney may use it to support his practice, or for personal or charitable purposes. The only difference in the instant case is that the court has awarded fees to attorneys who, like the salaried attorneys of the NAACP

Legal Defense and Educational Fund, are committed to contributing the fees they receive to their organizations. These organizations will use the funds in a manner consistent with their non-profit charitable status and public interest objectives.

Finally, it is obvious that the mere reimbursement of salaries would not compensate the organizations which employ the attorneys for such related expenses as secretarial assistance and overhead. These related expenses are traditionally included in an attorney's fee and should be included here.

In sum, the court of appeals' flexible approach, which has been adopted in numerous other cases,[126] was correct and should not be disturbed by this Court.

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[126] *See, e.g., Fairley* v. *Patterson, supra*, 493 F.2d at 606:

> "The [district] court's verbalized reason for denying expenses and limiting attorneys' fees for the 'much greater service' performed by the original plaintiffs than the intervenor, is the fact that the funds would flow into 'the coffers of the Ford Foundation.' This is an impermissible rationale to use in determining the amount of attorneys' fees and expenses. This Court has indicated on several occasions that allowable fees and expenses may not be reduced because appellants' attorney was employed or funded by a civil rights organization and/or tax-exempt foundation or because the attorney does not exact a fee." (Footnotes omitted).

See also Clark v. *American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971); *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals authorizing an award of attorneys' fees to respondents should be affirmed by this Court.

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APPENDICES

APPENDIX A

DESCRIPTION OF THE TRANS-ALASKA PIPELINE SYSTEM *

A. The Proposed Project

The proposed Trans-Alaska pipeline would be the "most complex," "most costly," and "most ecologically sensitive" project ever undertaken (P. Docs. III, Tab B, p. 4). Its purpose is to transport oil from Prudhoe Bay on Alaska's North Slope to the Port of Valdez at Prince William Sound in southern Alaska. In order to construct the pipeline it will be necessary to build a road from Livengood to the North Slope to transport construction materials and personnel. Various other facilities, including air fields, pumping stations, and communication sites will also be required for construction and operation of the pipeline. From Valdez, the oil will be loaded onto tankers for marine transport to destinations on the west coast of the United States and possibly elsewhere (FIS, Vol 1, pp. 1-2).

The North Slope oil fields also contain significant quantities of natural gas (FIS, Vol. 4, p. 69). Much of the gas will be produced simultaneously with the oil and, indeed, must be produced if the oil is to be produced (FIS, Vol. 1, p. 57). "It seems clear that a single gas line will be built through Canada to the United States markets" (ESA, Vol. I, p. C-22). Such a gas transportation system is an essential requirement of any oil pipeline system (FIS, Vol. 1, p. 50, 57).

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* This description is taken verbatim from the Brief on National Environmental Policy Act Issues filed below by The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth.

1. Terrestrial Impact of the Proposed Oil Pipeline

The Trans-Alaska oil pipeline would cut a swath across the entire length of Alaska. On its 789-mile journey, the proposed pipeline would cross some 641 miles of federal lands (FIS, Vol. 1, p. 1); transect the four major physiographic divisions of Alaska—the Interior Plains (the Arctic Slope), Rocky Mountain System (the Brooks Range), Intermontane Plateaus, and Pacific Mountain System (Alaska and Chugach Ranges) (FIS, Vol. 2, p. 13—and four primary river basins—those of the Sagavanirktok, Yukon, Copper, and Lowe Rivers—whose unpolluted waters constitute a vast wilderness primarily used for hunting, fishing, trapping, and recreation (FIS, Vol. 2, p. 76).

a. Wilderness and Recreation Areas

"Outside the cities of Anchorage and Fairbanks, the coastal towns and their interconnecting transportation routes are great expanses of wilderness" (FIS, Vol. 2, pp. 213-214). The pipeline would "divide" "into two" the "largest wilderness area in the United States," which extends from the Arctic Ocean to the Yukon River (FIS, Vol. 1, p. 151). The bleak Arctic Slope and the Brooks Range support a kingdom of wildlife including caribou, mountain sheep, moose, muskoxen, grizzly and polar bears, wolf, coyote, wolverine, fox, lynx, marten, mink, otter, weasel, and various rodents (FIS, Vol. 2, p. 175). And the wilderness south of the Brooks Range includes many of the same species in even greater densities (FIS, Vol. 2, pp. 184-186).

The associated 361-mile road from Livengood to the North Slope will open this heretofore unblemished wilderness, resulting in increased hunting pressures that will threaten the populations of grizzly and brown bear, polar bear, and mountain sheep (FIS, Vol. 4, pp. 164-165);

increased forest fires that will destroy forage for caribou and mountain sheep (FIS, Vol. 4, p. 109); and rapid deterioration of the "spectacular fishing quality" of northern streams (FIS, Vol. 4, p. 138). The route of this road "was chosen mainly to meet engineering requirements and to facilitate construction and servicing of the pipeline. . . . [P]ublic interest . . . was not a consideration in planning the layout of the road. . . . Large mammal resource values would be better protected . . . if . . . animal movements, hunter access and wildlife viewing had been taken into consideration. . . ." (FIS, Vol. 4, p. 39).

The pipeline would cross the Yukon River, which dwarfs all others in Alaska with a drainage area of 330,000 square miles, one-third of which is in Canada (FIS, Vol. 2, p. 155). The chinook, chum, and coho salmon in the Yukon which migrate as far as 2,000 miles to the headwaters to spawn represent unique and irreplaceable races of their species. Other fish found in the Yukon River basin include grayling, sculpin, sucker, whitefish, trout, northern pike, burbot, and inconnu (FIS, Vol. 2, pp. 155-156).

South of the Yukon River the pipeline will intrude on some of the most popular recreational areas in Alaska, including the Copper River System, the most important salmon water in central Alaska. About 40 million sockeye salmon have been taken commercially from the Copper River since 1904 and it supports an important subsistence fishery (FIS, Vol. 2, p. 156). The Gulkana River, the tributary of the Copper, which is tightly hugged by the pipeline route, is singled out as:

> ". . . a beautiful clean stream which is accessible by road almost throughout its entire length, [and as being] the most important fishery stream in the Copper River System. Some 100,000 sockeye and

20,000 chinook salmon and some steelhead migrate up this stream annually." (FIS, Vol. 2, p. 157).

The Gulkana flows through Summit and Paxson Lakes, both of which "offer excellent fishing. . . . Paxson Lake Campground . . . is the most heavily used recreation facility in this region. . . . [T]he campground is often over-subscribed during the summer" (FIS, Vol. 2, p. 254).

Some 234 gravel pits will be established from which will be extracted 83 million cubic yards of gravel (FIS, Vol. 1, p. 245; Vol. 4, p. 66). Access roads and the pipeline would also become permanent features of the landscape (FIS, Vol. 4, p. 139). Aesthetic values in all areas traversed by the pipeline would be reduced (FIS, Vol. 4, p. 139); and further development will follow on the heels of pipeline construction (FIS, Vol. 1, pp. 248-251).

b. Wildlife

Substantial sections of the pipeline will be elevated. These portions, together with the associated road, will present a "combined barrier effect" on migrations of large mammals, especially caribou, preventing them from reaching calving grounds and grazing ranges (FIS, Vol. 4, pp. 157-161).* However, "because of the limited research that has been done to date on the behavior of wild animals, the significance of the disruption of behavior patterns on the well-being of wildlife cannot be fully evaluated" (FIS, Vol. 4, p. 149). Nor can a full evaluation be made of "the effects of the above-ground portions of the pipeline on movements of large mammals" (FIS, Vol. 4, pp. 531-533), the effects on large mammals of the odors and sounds from the pipeline (FIS, Vol. 4, p. 159), or the extent of destruction of lichens, which are forage for caribou, from SO2 emissions from pumping stations (FIS, Vol. 4, pp. 117-118). "Virtually no information is available . . . on the effects of crude oil on large mammals as a result of direct contact or ingestion" (FIS, Vol. 4, p. 626).

* The pipeline will transect carbou range in the Sagavanirktok, the Yukon, and the Copper River drainages (FIS, Vol. 2, p. 159, Table 12). The Sagavanirktok drainage is split down the middle by the pipeline and associated road. It is flanked by the ranges of the Porcupine herd, numbering 140,000 caribou, on the east and, on the west, by the Arctic herd which numbers 243,000 caribou. These two herds intermingle in the summer in the vicinity of the proposed pipeline route (FIS, Vol. 2, p. 176). For over 50 miles the pipeline could block their migration routes, including one pass used in spring by some 25,000 caribou (FIS, Vol. 4, pp. 158-159). In addition, certain damage to caribou will occur in the Copper River Basin where 20,000 caribou of the Nelchina herd may be cut off from their calving grounds (FIS, Vol. 4, p. 158). And, south of the Brooks Range portions of the Western Artic caribou herd as well as moose will be affected (FIS, Vol. 4, p. 157).

The "relative toxicity of North Slope crude oil to birds is not known" (FIS, Vol. 4, p. 229). But it is known that "refined petroleum materials are . . . lethally toxic to waterbirds" (Ibid), and that "oil spills on water and land are detrimental to birds and their habitat" (FIS, Vol. 4, p. 191). "Migratory birds that seasonally reside or migrate through [Alaska] . . . are part of an international resource that is shared by many people of many nations" (FIS, Vol. 2, p. 163). The Copper River Delta, which would be traversed by the pipeline "undoubtedly supports some of the greatest remaining concentrations of birdlife on the face of the earth" (FIS, Vol. 3, p. 311). Yet "except for a few species and races, information on seasonal distribution and numbers, breeding biology, habitat requirements and migration routes for most species within the State and adjacent marine waters is scanty at best and usually either fragmentary or generalized" (FIS, Vol. 2, p. 163).**

** Among the hundreds of bird species that will be jeopardized by oil spills along the tanker route are: whistling and trumpeter swans; mallards, black brant, yellow-billed loons, and the great crested grebe; the great blue heron, emperor goose, king eider,

c. Seismic Concerns

For a full two-thirds of its route, the pipeline traverses "one of the most seismically active regions in the world" (FIS, Vol. 3, p. 20). And "it is almost a certainty that one or more large earthquakes will occur in the vicinity of this portion of the proposed route during the lifetime of the pipeline" (FIS, Vol. 1, p. 97). Surface faulting is acknowledged to constitute a major risk of pipe rupture (FIS, Vol. 1, p. 15; Vol. 2, p. 11), and can in turn "trigger landslides and sea waves that could jeopardize the integrity of the pipeline" (FIS, Vol. 2, p. 11). Yet only one active fault has actually been identified along the entire pipeline route (FIS, Vol. 4, pp. 48-49). For four large segments, which total more than 250 miles, and are characterized by the occurrence of sizeable earthquakes, faults have either not been identified or have not been verified as being active (FIS, Vol. 4, pp. 40, 41, 44, 52).

d. Streams and Fish

The pipeline makes hundreds of stream crossings and parallels streams for half its route. Bed scour and bank erosion at stream crossings can rupture the pipeline (FIS, Vol. 1, Summary Sheet). Yet the features of the arctic and sub-arctic environment which determine the extent of bed scour and bank erosion (such as stream icings, ice jam floods, and floods resulting from outbursts of glacier-dammed lakes) vary greatly from year to year and have not been systematically studied (FIS, Vol. 2, pp. 81-83, 97). "[T]he amount of erosion to be expected due to construction activities cannot be predicted with any degree of precision because (1) the project description doesn't give important 'as-built' details, (2) the probability and extent of future floods, icings, and ice jams are unknown, (3) the erosion effects of floods are difficult to evaluate, and (4) the success of erosion-control methods is unpredictable. . . ." (FIS, Vol. 4, p. 78).

ruddy duck, motley-faced shearwater, and least sandpiper; 14 species of gull, the endangered short-tailed albatross, long-tailed jaeger, marbled godwit, tufted puffin, whimbrel and the wandering tatler (FIS, Vol. 3, p. 309, Table 40).

Even with the best leak detection capability now developed, as much as 750 barrels of oil could be lost every day without being detected (FIS, Vol. 4, p. 135). If the pipe were actually to rupture, more than 60,000 barrels could escape (FIS, Vol. 1, p. 23). Any major spill resulting from pipeline failure would likely find its way into a stream (FIS, Vol. 4, pp. 16-53). From the point at which it is spilled, oil would drift downstream for considerable distances, jeopardizing not only the primary river basins but also the Beaufort Sea, Prince William Sound and the Pacific Ocean (FIS, Vol. 4, pp. 135-136). "Adequate studies on pollution and its effect on the reproductive capability of fish and invertebrates appear not to have been done" (FIS, Vol. 4, p. 199). "Detailed information is not available on the economic structure of Alaska's fisheries industry" (FIS, Vol. 4, p. 432). "[T]he cost effect of possible pollution impact on commercial fisheries is also not subject to determination, pending further studies" (FIS, Vol. 4, p. 363).

2. Marine Impact of the Proposed Oil Pipeline

The proposed oil pipeline will introduce the first major oil pollution into the waters of Prince William Sound and the Northeast Pacific (FIS, Vol. 4, p. 482).

At the present time, Prince William Sound is an area of "truly clean and untarnished beauty . . . teeming with marine life" (FIS, Vol. 2, p. 216). It supports a thriving commercial fishery for pink, chum, and sockeye salmon, Dungeness and tanner crabs, razor clams, herring and herring eggs, and is known to have commercial quanti-

ties of other species which have not yet been fished (FIS, Vol. 3, pp. 370-373). Moreover, it is used extensively by recreationists for salt and fresh water fishing, sightseeing, and photography. Its abundant porpoises, seals, sea otters, and sea lions, the beauty of its rugged shoreline scalloped by bays and fjords, and its backdrop of steep mountains and glaciers that creep down to water's edge afford visitors a unique wilderness experience (FIS, Vol. 2, p. 216; Vol. 3, pp. 399-402). The vast Northeast Pacific is similarly used for recreation and commercial fishing. It "is now relatively unpolluted compared to much of the remainder of the world's oceans" (FIS, Vol. 4, p. 542). Along the entire tanker route, "there is little history of casualties resulting in pollution . . ." (FIS, Vol. 3, p. 417).

"[A]ccidents and unintentional discharges would occur in spite of full utilization of technological advances and the most stringent regulations" (FIS, Vol. 1, p. 205). In an average year as much as 140,000 barrels of oil may be spilled into the marine environment as a result of tanker casualties (grounding and collisions) (FIS, Vol. 4, p. 474); additional quantities could be pumped directly into ocean waters during tank cleaning operations (FIS, Vol. 3, pp. 420-426; Vol. 4, p. 469); and there will be a continual intentional discharge of oil from a ballast treatment plant at Port Valdez, causing chronic pollution of Prince William Sound (FIS, Vol. 4, p. 467).

According to statistics prepared by the Environmental Protection Agency, less than five percent of oil spilled is recovered (FIS, Vol. 4, p. 484). Large spills in Prince William Sound "would be more difficult to contain, clean-up, and restore" than spills in other areas of the country because "of the distances from sources of ships and cleanup gear and the generally limited available manpower in the region" (FIS, Vol. 4, p. 484). "[U]nless extraordinary advances in oil containment and recovery

techniques occur, almost all of the oil spilled by the tanker system would constitute an adverse impact on the marine ecosystem" (FIS, Vol. 1, p. 225).

Any attempt to predict the impact on the marine environment is hampered by: (1) lack of basic information concerning many types of oil toxicity mechanisms; (2) difficulty in predicting the frequency and location of spills; and (3) lack of baseline data on biotic resources (FIS, Vol. 4, p. 196). "[T]he available information on potential effects of oil pollution reveals more unknowns than proven conclusions." It is "not at all clear what the acute and long-term effects of oil upon the environment and living marine resources . . . would be" (FIS, Vol. 4, p. 623). "[T]here have not been sufficient studies . . . to describe the long-term effects of sublethal levels of oil pollution" (FIS, Vol. 4, p. 202). "[V]ery little research has been directed toward identifying the less obvious effects of oil pollution due to intentional discharge at sea" (FIS, Vol. 4, p. 204).

Existing hydrographic surveys are inadequate for practically every area that the proposed marine transport system will traverse from Port Valdez to Southern California (FIS, Vol. 3, pp. 162-164, 168-169, 174, 177). And, at this late date—some three and one-half years after the oil companies selected Valdez as their southern terminus—"little is known about the climatology of Prince William Sound" (FIS, Vol. 3, p. 101) and "very few data concerning wind speeds [have] been collected at Valdez" (FIS, Vol. 3, p. 102).

Even in the one area where it is known that there will be the intentional discharge of oil into the sea—the ballast treatment plant at Valdez—"the path[s] that the oil would take . . . cannot be predicted with the available information and the overall pollution level for Port Valdez . . . cannot be accurately predicted" (FIS, Vol. 6, p.

80). Thus, "the intentional discharge of ballast waters . . . would have some likelihood of becoming a threat to the various parts of the marine ecosystem . . . but the impact cannot be evaluated because of the variables involved" (FIS, Vol. 4, p. 216).

3. Impact of the Gas Pipeline

Each of the three trans-Canada gas pipeline routes considered in the Impact Statement measures more than 1,500 miles from Prudhoe Bay to Edmonton, Alberta (FIS, Vol. 5, pp. 138, 150, 161, 172). The Impact Statement devotes a total of eleven pages to its primary evaluation of the environmental impact of a gas pipeline along either of these three routes (FIS, Vol. 4, pp. 492-503), and it explains that "lack of detailed information on specific routes and facilities obviously limits the impact analysis" (FIS, Vol. 1, p. 176).

"[M]any of [the] adverse effects" of oil pipeline construction "would be the same for the gas transportation system selected." Like the oil pipeline, "construction of an arctic gas pipeline would leave a permanent mark on the landscape," although the impact of operation would be less than for an oil pipeline due to the temperature of transported gas, the general burial of the line, and the lessened impact of pipeline rupture (Vol. 4, pp. 492, 503, 583).

Each of the gas pipeline routes would have substantial environmental impacts on wilderness, fish, and wildlife over and above those associated with the oil pipeline segment of the proposal (FIS, Vol. 4, pp. 495-503; Vol. 5, pp. 143, 147). Although it is acknowledged that "it is probable that economies of . . . environmental impact will result from moving oil and gas through a common corridor," "the extent of such economies is not estimated" (ESA, Vol. I, p. C-23).

APPENDIX B

REPRESENTATIVE INDETERMINATES AND UNKNOWNS ACKNOWLEDGED IN THE FINAL IMPACT STATEMENT *

1. *Natural Gas, Common Corridor*

"[T]he operation of the pipeline system would lead to the extraction, transportation, and use of some unknown total quantity of oil and gas in excess of the presently known resources." (FIS, Vol. 4, p. 69).

* * * *

"The environmental impact of the gas transportation system that would necessarily accompany the crude oil transportation system is difficult to evaluate for several reasons. The most important reason is that no proposal describing a specific system or route has been received. It is therefore not certain what route or exactly what type of system would be proposed." (FIS, Vol. 4, p. 5).

* * * *

"Whatever mode is chosen for transportation of gas, it is probable that economies of transportation cost and environmental impact will result from moving oil and gas through a common corridor . . . The extent of such economies is not estimated in the present analysis." (ESA, Vol. I, Appendix C, p. 23).

* * * *

"[T]he various impacts [along a Canadian route] cannot be evaluated nearly as well as can be those of the proposed pipeline system because of the level of information available. . . ." (FIS, Vol. 5, p. 233).

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* This compilation is taken verbatim from Appendix B of the Appendices submitted by The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth in conjunction with their Brief on National Environmental Policy Act Issues.

2. *Oil Spills: Likelihood, Effects and Cleanup*

a. *Likelihood, General Effects*

"In the event of a pipeline break, up to 50,000 barrels of oil could be drained from the pipeline after shutdown and valve closure. . . . Alyeska estimates that at peak throughput (2,000,000 bbl/day) an additional 8,333 barrels of oil could leak out during the 6 minutes required for pump station shut-down and valve closure. . . . The best leak detection capability expected after experience is estimated at 750 bbl/day. . . . Amounts of oil below this level could therefore be lost each day and not be detected by the line volume alarms." (FIS, Vol. 4, p. 135).

* * * *

"Atlantic Richfield calculated that a spill of 25,000 barrels from the proposed trans-Alaska pipeline in winter would cover 6.6 acres in level country. The size of upland areas that would be covered by lesser or greater quantities in winter or summer was not discussed. How far a given quantity of oil would flow across sloping terrain not crossed by streams was not discussed. . . . Based on Atlantic Richfield Company's calculations, it is assumed that a comparable spill in summer would cover many more than 6.6 acres. It is also assumed that Atlantic Richfield Company's calculations are based on a leak in an above ground part of the pipe. How far oil would travel from a leak in a buried part of the pipe is not known, but such oil would likely discharge to the surface where the pipe crosses stream channels or depressions." (FIS, Vol. 4, pp. 112-113).

* * * *

"The intentional discharge of ballast waters into the Gulf of Alaska, as presently permitted by state, federal and international regulations, and the accidental loss of oil could be a definite threat to the marine eco-

system, but the adverse effects cannot be precisely evaluated due to the variables involved. The currents in the Gulf of Alaska would circulate any spilled oil so that it could affect areas far distant from the original discharge site." (FIS, Vol. 4, pp. 542-543).

* * * *

"Present international conventions, national and state statutes and regulations, and Alyeska procedures are such that the proportion of the ballast and tank cleaning residues that would be discharged into the sea and into the ballast treatment facility cannot be accurately predicted." (FIS, Vol. 4, p. 469).

* * * *

"[T]he international discharge of ballast waters into the Gulf of Alaska, as presently permitted by state, federal and international regulations, would have some likelihood of becoming a threat to the various parts of the marine ecosystem, but the impact cannot be evaluated because of the variables involved." (FIS, Vol. 4, p. 216).

* * * *

"The path(s) that the oil would take after leaving the diffuser at depth in Port Valdez cannot be predicted with the available information and the overall oil pollution level for Port Valdez likewise cannot be accurately predicted." (FIS, Vol. 6, p. 80).

* * * *

"Microbial degradation of oil in Port Valdez would undoubtedly occur, but at an unknown rate and thus with unknown impact." (FIS, Vol. 4, p. 210).

* * * *

"[T]he oil spill threats that would be imposed by the existence of the operating pipeline system and tanker system . . . . cannot be accurately predicted in terms of oil loss frequency, location, or volume due to the com-

plexities of the systems, the variables, and the projection bases involved." (FIS, Vol. 4, pp. 4-5).

* * * *

"The northeast Pacific is now relatively unpolluted compared to much of the remainder of the world's oceans. The background hydrocarbon level is relatively low in Port Valdez and Prince William Sound, and even though it is not at all clear what the acute and long-term effects of oil upon the environment would be, it is expected that the biological effects would be most apparent in these areas." (FIS, Vol. 4, p. 542).

* * * *

"It may be concluded then, that the components of the marine ecosystems are sufficiently dissimilar between the northern and southern portions of the route to expect a markedly different response to both acute and chronic low-level oil pollution. The theoretical bases and research data . . . are not adequate to permit accurate prediction of these responses however." (FIS, Vol. 4, p. 211).

b. *Effects on Fish and Wildlife*

"Predictions of the effects of North Slope crude oil on biotic systems of Alaska are nearly all limited by one or more of three general constraints: (1) basic information concerning many types of oil toxicity mechanisms is incomplete; (2) there is difficulty in predicting the frequency, volume, location and timing of oil losses which would occur along the proposed route; and (3) in many cases existing information about biotic resources is often insufficient for analytical use." (FIS, Vol. 4, p. 98).

* * * *

"A study of the available information on potential effects of oil pollution reveals more unknowns than proven conclusions. It thus is not at all clear what the acute and long-term effects of oil upon the environment and

living marine resources of a region would be." (FIS, Vol. 4, p. 623).

* * * *

"Studies of the effects of chronic and low-level pollution upon subadult, larval and egg stages and the causes for changes in survival are extremely limited. Simply measuring plankton volume or counting species to evaluate the impact of an oil spill may not detect the psysiological effects." (FIS, Vol. 4, p. 625).

* * * *

"[T]he consequences of pollutant hydrocarbons in marine ecosystems is as yet not understood." (FIS, Vol. 4, p. 626).

* * * *

"Virtually no information is available, however, on the effects of crude oil on large mammals, as a result of direct contact or ingestion . . . The amount of oil which could be ingested before acute effects results is not known and presumably would vary between species." (FIS, Vol. 4, p. 171).

* * * *

"Adequate studies on oil pollution and its effect on the reproductive capability of fish and invertebrates appear not to have been done." (FIS, Vol. 4, p. 199).

* * * *

"There have not been sufficient studies, however, to describe the long-term effects of sublethal levels of oil pollution." (FIS, Vol. 4, p. 202).

* * * *

"Very little research has been directed toward identfying the less obvious effects of oil pollution due to intentional discharge at sea." (FIS, Vol. 4, p. 204).

* * * *

"The impact on beach utilizing mammals of oil hydrocarbons that have become entrained in the marine eco-

system from chronic low-level sources is unknown, but some of the possible ramifications are discussed in the appendix to this volume." (FIS, Vol. 4, p. 248).

• • • •

"The effect on fur seals of petroleum products in the marine environment can only be inferred." (FIS, Vol. 3, p. 249).

• • • •

"Waterfowl losses from oil reaching the deltas of the Yukon and Copper Rivers could be serious both because densities of birds are great and because some species and races are unique to these areas. The occurrence of such events cannot be predicted nor the results evaluated because of the uncertainties involved." (FIS, Vol. 4, pp. 191-192).

• • • •

"Birds and their habitat along the routes from Valdez to southern terminals would be affected by this marine system. The magnitude of the effects on this internationally important resource is unpredictable because of the many variables involved. These variables include the magnitude and nature of oil that could be spilled and the numbers and distribution of birds." (FIS, Vol. 4, p. 222).

• • • •

"Although the relative toxicity of North Slope crude oil to birds is not known, many refined petroleum materials are known to be lethally toxic to waterbirds." (FIS, Vol. 4, p. 229).

c. *Cleanup and Rehabilitation*

"The most significant impacts of the proposed pipeline upon fishery resources of the Beaufort Sea would occur with the spillage of oil. . . . The most serious problems would perhaps occur if oil were discharged under the

ice, since there is no known way to effectively clean up such a spill. . . ." (FIS, Vol. 4, p. 136).

• • • •

"Contingency plans should be directed toward first preventing and minimizing the chance for wildlife to become contaminated by oil and, second, rehabilitating those animals that are contaminated with oil. Techniques for solving both problems are presently either ineffective or untested and warrant efforts to perfect them." (FIS, Vol. 4, pp. 310-311).

• • • •

"Equipment and methodology do not now exist for the control and cleanup of large oil spills without significant environmental stress. This would be true for most small spills as well along much of the tanker route, and is especially true in the Subarctic." (FIS, Vol. 4, p. 543).

• • • •

"The Alaskan area presents a different situation than the west coast. The remoteness of the [Alaskan] area makes logistic support much more difficult to provide. At the present time there is very little response to polluting spills, not only in Valdez but in the entire area." (FIS, Vol. 4, p. 483).

• • • •

"Oil of varying sorts can be cleaned from the plumage of birds with several kinds of cleaners, but so far there is no convincing evidence that the natural water repelling qualities can be restored to the cleaned feathers by known means . . . ." (FIS, Vol. 4, pp. 232-233).

• • • •

"Alyeska Pipeline Service Company . . . intends to attempt rehabilitation of only the endangered species that are contaminated in the Port Valdez area. Their methods of rehabilitation, including cleaning, restoration of plum-

age, rearing procedures and facilities, have not been described." (FIS, Vol. 4, p. 234).

3. *Mari...*

a. *Physical and Chemical Oceanography*

"Basic hydrographic surveys of Port Valdez were made in 1966. . . . However, because of the possible presence of pinnacle rocks, wire drag surveys, particularly along the shoreline, are recommended before deep draft tankers operate in the area." (FIS, Vol. 3, pp. 162, 163).

* * * *

"One of the 1966 surveys of Port Valdez extended into the northern part of Valdez Narrows. The most recent survey of the southern part is dated 1902 and is inadequate." (FIS, Vol. 3, p. 163).

* * * *

"[S]urveys for 90% of [Prince William Sound] area date from 1902 to 1914 and are inadequate for accurate modern navigation data analysis . . . . The March 1964 earthquake caused a bottom uplift of from four to 32 feet in Prince William Sound. (FIS, Vol. 3, p. 164).

* * * *

"Hydrographic survey coverage for the entire [Gulf of Alaska] area is poor." (FIS, Vol. 3, p. 168).

* * * *

"Basic hydrographic survey coverage for the [Northeast Pacific] area is . . . considered inadequate except for . . . 1). small, isolated sections along the U.S. mainland coastline, 2). a 176,000 square mile area west of San Francisco, California, surveyed in 1960-66." (FIS, Vol. 3, p. 169).

* * * *

"Basichydrographic survey coverage for the western 50 miles of U.S. Strait of Juan de Fuca waters is . . .

considered inadequate for modern navigation requirements." (FIS, Vol. 3, p. 174).

* * * *

"Surveys [of Southern California] are considered inadequate. One survey of the area, from the Mexico-United States boundary and proceeding northward, started in 1968 and is expected to continue for the next several years." (FIS, Vol. 3, p. 177).

* * * *

"The National Marine Fisheries Service has a research program underway and intends to take limited special current measurements in the Port Valdez area. However, for good knowledge of the currents of this area a true circulatory survey is needed." (FIS, Vol. 3, p. 192).

* * * *

"Although oceanographic studies are continuing in Port Valdez, sufficient data are not yet on hand to accurately predict the diffusion and distribution of hydrocarbons discharged from the terminal operation." (FIS, Vol. 4, p. 208).

* * * *

" 'To understand the circulation and flushing characteristics of Port Valdez a year-round hydrographic and current sampling program and a very detailed study of tidal changes in chemical parameters of the waters will be necessary.' " (FIS, Vol. 4, p. 210).

* * * *

"A study in Valdez Arm by the University of Alaska is proposed to deal specifically with the chemical aspects of marine oil pollution. Limited temperature and salinity data are presented in the section on circulation of Prince William Sound." (FIS, Vol. 3, p. 206).

b. *Climate and Weather*

Data contained in summaries are based on observation by ships in passage, which tend to avoid bad weather

whenever possible, "thus biasing the data toward good weather samples." (FIS, Vol. 3, p. 66).

• • • •

"Little is known about the climatology of Prince William Sound. . . A meteorological observing station should be established in Prince William Sound as soon as possible. An instrumented bouy [sic] close to the shipping channel could obtain observations representative of conditions in the open sound." (FIS, Vol. 3, p. 101).

• • • •

"Very few data concerning wind speeds has been collected at Valdez." (FIS, Vol. 3, p. 102).

c. *Marine Aquatic Vegetation*

"Little detailed information concerning marine aquatic vegetation is available for the coast between Port Valdez and Puget Sound and for Alaskan waters in general. The information on marine algae is particularly limited for no mapping or repetitive sampling has taken place in that entire area." (FIS, Vol. 3, p. 221).

• • • •

"Planktonic plants are the only important plants in the open sea, but in the shallow waters rooted aquatic plants can develop. In addition to the higher plants there is a large algae (kelp and seaweed) production, plus an unknown microflora which, though not assessed, is thought to be of tremendous biological importance." (FIS, Vol. 3, pp. 233-234).

• • • •

"The impact of the proposed project on plankton along the tanker route cannot be completely evaluated other than to expect that some part of the plankton resource would disappear in certain locations and that the disappearance would, in turn, affect other parts of the marine ecosystem." (FIS, Vol. 4, p. 212).

• • • •

d. *Biologic Oceanography*

"Marine mammals of the Beaufort Sea are known with respect to species and biology, but poorly known in terms of numerical abundance." (FIS, Vol. 2, p. xlii).

• • • •

"Predictions of the effects of North Slope crude oil upon biotic systems of the marine environment are nearly all faced with one or more of three general constraints: (1) basic information concerning many types of oil toxicity mechanisms is incomplete; (2) there is difficulty in predicting the frequency, volume, location and timing of oil losses which would occur along the proposed route; and (3) existing information upon biotic resources is often insufficient for analytical use." (FIS, Vol. 4, p. 196).

4. *Wildlife*

"[T]he geographic, temporal, and numerical distributions of the fish, bird, and wildlife populations are known only within rather broad limits and the extent of knowledge varies from species to species and topic to topic." (FIS, Vol. 4, p. 4).

a. *Mammals*

"Because of the limited research that has been done to date on the behavior of wild animals, the significance of the disruption of behavior patterns on the wellbeing of wildlife cannot be fully evaluated. It is known, however, that disturbance during and immediately following birth can result in substantial decrease in survival of the new born young in moose . . . , mountain sheep . . . , and caribou . . . ." (FIS, Vol. 4, p. 149).

• • • •

"The effect of the above-ground portions of the pipeline on movements of large mammals cannot be conclusively predicted. Knowledge of the behavioral reaction of large mammals to obstructions is as yet quite limited, and there is not sufficient experience nor has the research been completed to provide a sound basis for the design and spacing of animal crossing facilities." (FIS, Vol. 4, p. 153).

* * * *

"Further deterrents to the movement of animals across the above-ground portion of the pipeline would be the possibility of the presence of odors from the insulation or other materials used in the pipe construction which the animals might react to and the possible influence of sound generated by the flowing oil in the pipeline. Neither the frequency and intensity of sounds which would be generated by the pipe, nor the muffling effect of the pipeline insulation, are now known." (FIS, Vol. 4, p. 159).

* * * *

"A noise level of 74 decibels at 600 feet from a pump station is estimated from a total accoustical band spectrum. . . . The effects of these noise levels on various animals are unknown." (FIS, Vol. 1, p. 113).

b. *Birds*

"Except for a few species and races, information on seasonal distribution and numbers, breeding biology, habitat requirements and migration routes for most bird species within the State and adjacent marine waters is scanty at best and usually either fragmentary or generalized. Correspondingly, information regarding the status of many species of birds within the zone-of-influence of the proposed pipeline and attendant facilities is poor; and much of it is circumstantially based upon findings

from unrelated investigations in other parts of the State." (FIS, Vol. 2, p. 163).

* * * *

"Population estimates for most non-game species are almost nonexistent." (FIS, Vol. 2, p.190).

* * * *

"[a] better appreciation of the importance of . . . offshore areas to birds is yet to be gained and some pertinent studies have just been initiated." (FIS, Vol. 2, p. 175).

* * * *

"Affinities of these nonbreeding waterfowl to their breeding populations elsewhere and of breeding waterfowl to wintering areas in the south have not been determined for most species." (FIS, Vol. 2, pp. 182-183).

* * * *

"The peregrine falcon also occurs in the Sound wherever there is suitable habitat. Little is known about their distribution and abundance. It is not know if the race found there is the coastal Falco peregrinus peali or the endangered F.p. annatum." (FIS, Vol. 3, p. 320).

c. *Insects*

"The insects of Alaska are not scientifically well known and systematic study of Alaskan species has only recently started." (FIS, Vol. 2, p. 149).

* * * *

"There is little doubt then that oil lost in an accident would have an adverse, short-term direct impact particularly on those insects in an aquatic environment. The indirect and long-term impacts . . . upon aquatic insects in the Alaska environment are unknown." (FIS, Vol. 4, p. 195).

5. *Fishery Resources*

"Knowledge of the life histories and population dynamics of the fishes in this area [Sagavanirktok River] is extremely limited." (FIS, Vol. 2, p. 154).

* * * *

"Very little is known of the fishes of the Beaufort Sea." (FIS, Vol. 2, p. 153).

"It is difficult to predict potential impacts when the state of knowledge about the fishery resources is incomplete and the proposed action is complex and involves many variables, only some of which are completely controllable." (FIS, Vol. 4, p. 125).

* * * *

"Streams that do not contain anadromous species of fish have generally received less attention. In fact, many of these waters have never been sampled or studied in any manner." (FIS, Vol. 4, p. 125).

* * * *

"The most serious remaining problems [regarding fish] would likely be caused by a number of unknowns." (FIS, Vol. 4, p. 133).

* * * *

"Detailed information is not available on the economic structure of Alaska's fisheries industry." (FIS, Vol. 4, p. 432).

* * * *

"Some approximation could be made of the losses to fishermen that would result from oil pollution associated with the project. The secondary effects on service and support facilities and the impact that a reduced multiplier effect would have on the general economy could only be speculated upon." (FIS, Vol. 4, p. 432).

* * * *

"Damage to shellfish resources elsewhere [than Port Valdez] along the coast would depend upon location, timing, and extent of spills and cannot be predicted because of these variables." (FIS, Vol. 4, p. 213).

* * * *

"The extent of loss [of herring eggs and larvae] to the fishermen cannot be predicted from available information." (FIS, Vol. 4, p. 434).

* * * *

"The effects of project operations upon the current and potential harvest of . . . finfish [other than salmon] resources cannot be estimated from current knowledge." (FIS, Vol. 4, p. 434).

* * * *

"Effects of oil pollution on the fisheries north and west of Prince William Sound are uncertain." (FIS, Vol. 4, p. 436).

"Spawning areas in the remainder of the [Prince William] Sound could be affected by spills occurring during the spawning period. The extent of loss to the fishermen cannot be predicted from available information. . . ." (FIS, Vol. 4, p. 434).

* * * *

"The harvest of clams, oysters and Dungeness crabs south of Prince William Sound bring the fishermen about $17 million annually. It is likely that losses to these fisheries could occur periodically as a result of the marine transport of oil, but the timing and extent of these losses cannot be predicted." (FIS, Vol. 4, p. 436).

6. *Geology*

a. *Earthquakes*

"Any point along the southern two-thirds of the proposed pipeline route could be subjected to a large-magnitude

earthquake (greater than 7.0 on the Richter Scale) and the probability that one or more large-magnitude earthquakes would occur in the vicinity of this portion of the proposed route during the lifetime of the pipeline is extremely high, in fact, almost a certainty." (FIS, Vol. 4, p. 518).

• • • •

"The proposed route intersects several recognized major faults in the active seismic region south of 67 N latitude; however, except for the Denali fault, which displays abundant geologic evidence of large Holocene offset (Richter and Matson, 1971), the risk of significant tectonic movement on these faults is essentially unknown at present. Many additional faults are also postulated, particularly in the segments 67 N to Donnelly Dome and Willow Lake to Valdez. Both of these segments are characterized by the frequent occurrence of sizeable earthquakes that have yet to be identified with individual faults." (FIS, Vol. 2, p. 11).

• • • •

"In July 1937, a magnitude 7.3 earthquake occurred southeast of Fairbanks. Landslides, mud boils, and ground fissures were observed (Bramhall, 1938) within 10 miles of the proposed pipeline route. On June 21, 1967, a series of three magnitude 5.5 shocks occurred within a few miles of the route. . . . In this section of the route, the seismic risk is substantial, although it cannot be correlated with recognizable tectonic features." (FIS, Vol. 2, p. 29).

• • • •

"The Kenai-Chugach Mountains are extremely active techtonically, which is demonstrated by the large number of earthquakes occurring in this section, and undoubtedly, faults are present. . . . However, it is difficult to locate fault zones in this area because of the uniform character of the bedrock and because of its

altered or metamorphosed character." (FIS, Vol. 2, p. 38).

• • • •

"Other significant engineering problems include extremely steep bedrock slopes to traverse in the Keystone Canyon and Thompson Pass areas, now unrecognized active fault zones, avalanche hazards locally between Keystone Canyon and Ernestine, and the large, probably inactive, landslide near Fort Liscum." (FIS, Vol. 2, p. 39).

• • • •

"The proposed pipeline also may cross a fault about one mile north of Grayling Lake. No evidence has been found to indicate whether the faults are active or inactive. Additional investigations will be required to determine the potential activity of these faults." (FIS, Vol. 4, p. 38).

• • • •

"The pipeline in this segment of the route would cross 2 faults in the vicinity of Fish Creek and may cross a third fault about 3 miles south of Prospect Creek. No evidence has been found to indicate whether these faults are active or inactive. Additional studies are required to determine the potential activity of the faults." (FIS, Vol. 4, p. 40).

• • • •

"The proposed pipeline would cross mapped faults at Aggie Creek, Globe Creek and 2 miles north of Globe Creek. In addition, 3 other faults were recognized in this segment and may extend across the pipeline alignment. . . . No evidence has been found to indicate whether or not the faults are active. A further study must be made to determine which of the faults cross the route alignment, and the activity of all of the faults." (FIS, Vol. 4, p. 44).

• • • •

"Although no faults have been delineated . . . the Kenai-Chugach Mountains are extremely active tectonically, and undoubtedly, faults are present." (FIS, Vol. 4, p. 52).

b. *Erosion*

"It is questionable whether or not the proposed construction pad thickness, in many places, is sufficient to prevent deleterious thawing of permafrost and thickening of the active layer. If the permafrost thaws, differential settlement or slope failure could occur locally, especially where the pad is underlain by ice-rich sediments. This problem could be severe on slopes and where drainage is impeded. Locally, where the temperature of the permafrost is close to 0°C, the thickness of the construction pad required to prevent thawing of the permafrost could be so great that it would be inadvisable to construct the pad." (FIS, Vol. 4, p. 24).

* * * *

"The amount of erosion to be expected due to construction activities cannot be predicted with any degree of precision because (1) the project description doesn't give important 'as-built' details, (2) the probability and extent of future floods, icings, and ice-jams are unknown, (3) the erosion effects of floods are difficult to evaluate, and (4) the success of erosion-control methods is unpredictable." (FIS, Vol. 4, p. 78).

c. *Soils Investigation*

"[A] large part of the route north of the Yukon River and some parts south of the Yukon River need further study." (FIS, Vol. 4, p. 10).

7. *Vegetation*

"Mosses and lichens make up a large part of tundra vegetation . . . but little is known about reproduction and growth rates in arctic regions." (FIS, Vol. 2, p. 125).

* * * *

"Most studies of reproduction and growth in larch have been made within its commercial range in the Lake States and southeastern Canada. No data are available from Alaska. . . . The behavior of seedlings and growth to maturity in Alaska cannot, with validity, be extrapolated from data available." (FIS, Vol. 2, p. 139).

* * * *

"Little is known of the frequency and quantity of seed produced by tundra species. . . . Also almost nothing is known of the percent of viable seed that are produced. . . . The reasons for the apparent slow rate of reproduction of tundra species can be presented only as hypotheses in the absence of continued observations." (FIS, Vol. 2, pp. 124-125).

* * * *

"Sites of 27 rare plant species are along or close to the pipeline alignment. . . . For some species, these locations are the only places where they are known; for other species they are the only known Alaska stations, but the species grow elsewhere." (FIS, Vol. 4, p. 109).

* * * *

"There are no methods to remove oil from terrestrial surfaces without destruction of vegetation on those surfaces." (FIS, Vol. 4, p. 113).

* * * *

"Gravel work pads, if not removed following construction completion, very likely would remain bare for many years because of compaction by the heavy machinery. No Alaskan experience on the rate of seedling establishment on compacted, coarse materials is known." (FIS, Vol. 4, p. 100).

8. *Air Quality*

"Air quality data are not available for the part of Alaska that would be crossed by the proposed pipeline route." (FIS, Vol. 2, p. xxxiii).

* * * *

"The available information does not fully ddescribe the emissions that would occur. . . . It is therefdfore not possible to evaluate the effect of the emissions (on the local environment because the emission levels are (not known." (FIS, Vol. 4, p. 96).

• • • •

"No estimates of volume of camp waste to (be processed are available and the anticipated emissionn levels for different pollutants are unknown at this time.:. No evaluation of the effects of the contaminants is thherefore possible." (FSI, Vol. 4, pp. 86, 88).

APPENDIX C

PUBLIC LAW 93-153: 87 STAT. 576

An Act to amend section 28 of the Mineral Leasing Act of 1920, and to authorize a trans-Alaska oil pipeline, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

TITLE I

Section 101. Section 28 of the Mineral Leasing Act of 1920 (41 Stat. 449), as amended (30 U.S.C. 185),[1] is further amended to read as follows:

"Grant of Authority

"Sec. 28. (a) Rights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom to any applicant possessing the qualifications provided in section 1 of this Act, as amended, in accordance with the provisions of this section.

"Definitions

"(b)(1) For the purposes of this section 'Federal lands' means all lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf. A right-of-way through a Federal reservation shall not be granted if the Secretary or agency head determines that it would be inconsistent with the purposes of the reservation.

[1] 30 U.S.C.A. § 185.

"(2) 'Secretary' means the Secretary of the Interior.

"(3) 'Agency head' means the head of any Federal department or independent Federal office or agency, other than the Secretary of the Interior, which has jurisdiction over Federal lands.

"Inter-Agency Coordination

"(c)(1) Where the surface of all of the Federal lands involved in a proposed right-of-way permit is under the jurisdiction of one Federal agency, the agency head, rather than the Secretary, is authorized to grant or renew the right-of-way or permit for the purposes set forth in this section.

"(2) Where the surface of the Federal lands involved is administered by the Secretary or by two or more Federal agencies, the Secretary is authorized, after consultation with the agencies involved, to grant or renew rights-of-way or permits through the Federal lands involved. The Secretary may enter into intragency agreements with all other Federal agencies having jurisdiction over Federal lands for the purpose of avoiding duplication, assigning responsibility, expediting review of rights-of-way or permit applications, issuing joint regulations, and assuring a decision based upon a comprehensive review of all factors involved in any right-of-way or permit application. Each agency head shall administer and enforce the provisions of this section, appropriate regulations, and the terms and conditions of rights-of-way or permits insofar as they involve Federal lands under the agency head's jurisdiction.

"Width Limitations

"(d) The width of a right-of-way shall not exceed fifty feet plus the ground occupied by the pipeline (that is, the pipe and its related facilities) unless the Secretary or agency head finds, and records the reasons for his finding, that in his judgment a wider right-of-way is necessary for operation and maintenance after construction, or to protect the environment or public safety. Related facilities include but are not limited to valves, pump stations, supporting structures, bridges, monitoring and communication devices, surge and storage tanks, terminals, roads, airstrips and campsites, and they need not necessarily be connected or contiguous to the pipe and may be the subjects of separate rights-of-way.

"Temporary Permits

"(e) A right-of-way may be supplemented by such temporary permits for the use of Federal lands in the vicinity of the pipeline as the Secretary or agency head finds are necessary in connection with construction, operation, maintenance, or termination of the pipeline, or to protect the natural environment or public safety.

"Regulatory Authority

"(f) Rights-of-way or permits granted or renewed pursuant to this section shall be subject to regulations promulgated in accord with the provisions of this section and shall be subject to such terms and conditions as the Secretary or agency head may prescribe regarding extent, duration, survey, location, construction, operation, maintenance, use, and termination.

"Pipeline Safety

"(g) The Secretary or agency head shall impose requirements for the operation of the pipeline and related facilities in a manner that will protect the safety of workers and protect the public from sudden ruptures and slow degradation of the pipeline.

"Environmental Protection

"(h)(1) Nothing in this section shall be construed to amend, repeal, modify, or change in any way the requirements of section 102(2)(C) or any other provision of the National Environmental Policy Act of 1969 (Public Law 91-190, 83 Stat. 852).

"(2) The Secretary or agency head, prior to granting a right-of-way or permit pursuant to this section for a new project which may have a significant impact on the environment, shall require the applicant to submit a plan of construction, operation, and rehabilitation for such right-of-way or permit which shall comply with this section. The Secretary or agency head shall issue regulations or impose stipulations which shall include, but shall not be limited to: (A) requirements for restoration, revegetation, and curtailment of erosion of the surface of the land; (B) requirements to insure that activities in connection with the right-of-way or permit will not violate applicable air and water quality standards nor related facility siting standards established by or pursuant to law; (C) requirements designed to control or prevent (i) damage to the environment (including damage to fish and wildlife habitat), (ii) damage to public or private property, and (iii) hazards to public health and safety; and (D) requirements to protect the interests of individuals living in the general area of the right-of-way or permit who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes. Such regulations shall be applicable to every right-of-way or permit granted pursuant to this section, and may be made applicable by the Secretary or agency head to existing rights-of-way or permits, or rights-of-way or permits to be renewed pursuant to this section.

"Disclosure

"(i) If the applicant is a partnership, corporation, association, or other business entity, the Secretary or agency head shall require the applicant to disclose the identity of the participants in the entity. Such disclosure shall include where applicable (1) the name and address of each partner, (2) the name and adress of each shareholder owning 3 per centum or more of the shares, together with the number and percentage of any class of voting shares of the entity which such shareholder is authorized to vote, and (3) the name and address of each affiliate of the entity together with, in the case of an affiliate controlled by the entity, the number of shares and the percentage of any class of voting stock of that affiliate owned, directly or indirectly, by that entity, and, in the case of an affiliate which controls that entity, the number of shares and the percentage of any class of voting stock of that entity owned, directly or indirectly, by the affiliate.

"Technical and Financial Capability

"(j) The Secretary or agency head shall grant or renew a right-of-way or permit under this section only when he is satisfied that the applicant has the technical and financial capability to construct, operate, maintain, and terminate the project for which the right-of-way or permit is requested in accordance with the requirements of this section.

"Public Hearings

"(k) The Secretary or agency head by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local government agencies and the public adequate notice and an opportunity to comment upon right-of-way applications filed after the date of enactment of this subsection.

"Reimbursement of Costs

"(l) The applicant for a right-of-way or permit shall reimburse the United States for administrative and other costs incurred in processing the application, and the holder of a right-of-way or permit shall reimburse the United States for the costs incurred in monitoring the construction, operation, maintenance, and termination of any pipeline and related facilities on such right-of-way or permit area and shall pay annually in advance the fair market rental value of the right-of-way or permit, as determined by the Secretary or agency head.

"Bonding

"(m) Where he deems it appropriate the Secretary or agency head may require a holder of a right-of-way or permit to furnish a bond, or other security, satisfactory to the Secretary or agency head to secure all or any of the obligations imposed by the terms and conditions of the right-of-way or permit or by any rule or regulation of the Secretary or agency head.

"Duration of Grant

"(n) Each right-of-way or permit granted or renewed pursuant to this section shall be limited to a reasonable term in light of all circumstances concerning the project, but in no event more than thirty years. In determining the duration of a right-of-way the Secretary or agency head shall, among other things, take into consideration the cost of the facility, its useful life, and any public purpose it serves. The Secretary or agency head shall renew any right-of-way, in accordance with the provisions of this section, so long as the project is in commercial operation and is operated and maintained in accordance with all of the provisions of this section.

"Suspension or Termination of Right-of-Way

"(o)(1) Abandonment of a right-of-way or noncompliance with any provision of this section may be grounds for suspension or termination of the right-of-way if (A) after due notice to the holder of the right-of-way, (B) a reasonable opportunity to comply with this section, and (C) an appropriate administrative proceeding pursuant to title 5, United States Code, section 554, the Secretary or agency head determines that any such ground exists and that suspension or termination is justified. No administrative proceeding shall be required where the right-of-way by its terms provides that it terminates on the occurrence of a fixed or agreed upon condition, event, or time.

"(2) If the Secretary or agency head determines that an immediate temporary suspension of activities within a right-of-way or permit area is necessary to protect public health or safety or the environment, he may abate such activities prior to an administrative proceeding.

"(3) Deliberate failure of the holder to use the right-of-way for the purpose for which it was granted or renewed for any continuous two-year period shall constitute a rebuttable presumption of abandonment of the right-of-way: *Provided*, That where the failure to use the right-of-way is due to circumstances not within the holder's control the Secretary or agency head is not required to commence proceedings to suspend or terminate the right-of-way.

"Joint Use of Rights-of-Way

"(p) In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way across Federal lands, the utilization of rights-of-way in common shall be required to the extent practical, and each right-of-way or permit shall reserve to the Secre-

tary or agency head the right to grant additional rights-of-way or permits for compatible uses on or adjacent to rights-of-way or permit area granted pursuant to this section.

"Statutes

"(q) No rights-of-way for the purposes provided for in this section shall be granted or renewed across Federal lands except under and subject to the provisions, limitations, and conditions of this section. Any application for a right-of-way filed under any other law prior to the effective date of this provision may, at the applicant's option, be considered as an application under this section. The Secretary or agency head may require the applicant to submit any additional information he deems necessary to comply with the requirements of this section.

"Common Carriers

"(r)(1) Pipelines and related facilities authorized under this section shall be constructed, operated, and maintained as common carriers.

"(2)(A) The owners or operators of pipelines subject to this section shall accept, convey, transport, or purchase without discrimination all oil or gas delivered to the pipeline without regard to whether such oil or gas was produced on Federal or non-Federal lands.

"(B) In the case of oil or gas produced from Federal lands or from the resources on the Federal lands in the vicinity of the pipeline, the Secretary may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine the proportionate amounts to be accepted, conveyed, transported or purchased.

"(3)(A) The common carrier provisions of this section shall not apply to any natural gas pipeline operated

by any person subject to regulation under the Natural Gas Act or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality.

"(B) Where natural gas not subject to State regulatory or conservation laws governing its purchase by pipelines is offered for sale, each such pipeline shall purchase, without discrimination, any such natural gas produced in the vicinity of the pipeline.

"(4) The Government shall in express terms reserve and shall provide in every lease of oil lands under this Act that the lessee, assignee, or beneficiary, if owner or operator of a controlling interest in any pipeline or of any company operating the pipeline which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipeline operating a lease or purchasing gas or oil under the provisions of this Act.

"(5) Whenever the Secretary has reason to believe that any owner or operator subject to this section is not operating any oil or gas pipeline in complete accord with its obligations as a common carrier hereunder, he may request the Attorney General to prosecute an appropriate proceeding before the Interstate Commerce Commision or Federal Power Commission or any appropriate State agency or the United States district court for the district in which the pipeline or any part thereof is located, to enforce such obligation or to impose any penalty provided therefor, or the Secretary may, by proceeding as provided in this section, suspend or terminate the said grant of right-of-way for noncompliance with the provisions of this section.

"(6) The Secretary or agency head shall require, prior to granting or renewing a right-of-way, that the applicant submit and disclose all plans, contracts, agreements, or other information or material which he deems necessary to determine whether a right-of-way shall be granted or renewed and the terms and conditions which should be included in the right-of-way. Such information may include, but is not limited to: (A) conditions for, and agreements among owners or operators, regarding the addition of pumping facilities, looping, or otherwise increasing the pipeline or terminal's throughput capacity in response to actual or anticipated increases in demand; (B) conditions for adding or abandoning intake, offtake, or storage points or facilities; and (C) minimum shipment or purchase tenders.

"Right-of-Way Corridors

"(s) In order to minimize adverse environmental impacts and to prevent the proliferation of separate rights-of-way across Federal lands, the Secretary shall, in consultation with other Federal and State agencies, review the need for a national system of transportation and utility corridors across Federal lands and submit a report of his findings and recommendations to the Congress and the President by July 1, 1975.

"Existing Rights-of-Way

"(t) The Secretary or agency head may ratify and confirm any right-of-way or permit for an oil or gas pipeline or related facility that was granted under any provision of law before the effective date of this subsection, if it is modified by mutual agreement to comply to the extent practical with the provisions of this section. Any action taken by the Secretary or agency head pursuant to this subsection shall not be considered a major Federal action requiring a detailed statement pursuant

to section 102(2)(C) of the National Environmental Policy Act of 1970 (Public Law 90-190; 42 U.S.C. 4321).

"Limitations on Export

"(u) Any domestically produced crude oil transported by pipeline over rights-of-way granted pursuant to section 28 of the Mineral Leasing Act of 1920, except such crude oil which is either exchanged in similar quantity for convenience or increased efficiency of transportation with persons or the government of an adjacent foreign state, or which is temporarily exported for convenience or increased efficiency of transportation across parts of an adjacent foreign state and reenters the United States, shall be subject to all of the limitations and licensing requirements of the Export Administration Act of 1969 (Act of December 30, 1969; 83 Stat. 841) and, in addition, before any crude oil subject to this section may be exported under the limitations and licensing requirements and penalty and enforcement provisions of the Export Administration Act of 1969 the President must make and publish an express finding that such exports will not diminish the total quantity or quality of petroleum available to the United States, and are in the national interest and are in accord with the provisions of the Export Administration Act of 1969: *Provided*, That the President shall submit reports to the Congress containing findings made under this section, and after the date of receipt of such report Congress shall have a period of sixty calendar days, thirty days of which Congress must have been in session, to consider whether exports under the terms of this section are in the national interest. If the Congress within this time period passes a concurrent resolution of disapproval stating disagreement with the President's finding concerning the national interest, further exports made pursuant to the aforementioned Presidential findings shall cease.

"State Standards

"(v) The Secretary or agency head shall take into consideration and to the extent practical comply with State standards for right-of-way construction, operation, and maintenance.

"Reports

"(w)(1) The Secretary and other appropriate agency heads shall report to the House and Senate Committees on Interior and Insular Affairs annually on the administration of this section and on the safety and environmental requirements imposed pursuant thereto.

"(2) The Secretary or agency head shall notify the House and Senate Committees on Interior and Insular Affairs promptly upon receipt of an application for a right-of-way for a pipeline twenty-four inches or more in diameter, and no right-of-way for such a pipeline shall be granted until sixty days (not counting days on which the House of Representatives or the Senate has adjourned for more than three days) after a notice of intention to grant the right-of-way, together with the Secretary's or agency head's detailed findings as to terms and conditions he proposes to impose, has been submitted to such committees, unless each committee by resolution waives the waiting period.

"(3) Periodically, but at least once a year, the Secretary of the Department of Transportation shall cause the examination of all pipelines and associated facilities on Federal lands and shall cause the prompt reporting of any potential leaks or safety problems.

"(4) The Secretary of the Department of Transportation shall report annually to the President, the Congress, the Secretary of the Interior, and the Interstate Commerce Commission any potential dangers of or actual explosions, or potential or actual spillage on Federal lands

and shall include in such report a statement of corrective action taken to prevent such explosion or spillage.

"Liability

"(x)(1) The Secretary or agency head shall promulgate regulations and may impose stipulations specifying the extent to which holders of rights-of-way and permits under this Act shall be liable to the United States for damage or injury incurred by the United States in connection with the right-of-way or permit. Where the right-of-way or permit involves lands which are under the exclusive jurisdiction of the Federal Government, the Secretary or agency head shall promulgate regulations specifying the extent to which holders shall be liable to third parties for injuries incurred in connection with the right-of-way or permit.

"(2) The Secretary or agency head may, by regulation or stipulation, impose a standard of strict liability to govern activities taking place on a right-of-way or permit area which the Secretary or agency head determines, in his discretion, to present a foreseeable hazard or risk of danger to the United States.

"(3) Regulations and stipulations pursuant to this subsection shall not impose strict liability for damage or injury resulting from (A) an act of war, or (B) negligence of the United States.

"(4) Any regulation or stipulation imposing liability without fault shall include a maximum limitation on damages commensurate with the foreseeable risks or hazards presented. Any liability for damage or injury in excess of this amount shall be determined by ordinary rules of negligence.

"(5) The regulations and stipulations shall also specify the extent to which such holders shall indemnify or hold

harmless the United States for liability, damage, or claims arising in connection with the right-of-way or permit.

"(6) Any regulation or stipulation promulgated or imposed pursuant to this section shall provide that all owners of any interest in, and all affiliates or subsidiaries of any holder of, a right-of-way or permit shall be liable to the United States in the event that a claim for damage or injury cannot be collected from the holder.

"(7) In any case where liability without fault is imposed pursuant to this subsection and the damages involved were caused by the negligence of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damage occurred.

"Antitrust Laws

"(y) The grant of a right-of-way or permit pursuant to this section shall grant no immunity from the operation of the Federal antitrust laws."

TITLE II

Short Title

Sec. 201. This title may be cited as the "Trans-Alaska Pipeline Authorization Act".

Congressional Findings

Sec. 202. The Congress finds and declares that:

(a) The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

(b) The Department of the Interior and other Federal agencies, have, over a long period of time, conducted extensive studies of the technical aspects and of the environmental, social, and economic impacts of the proposed trans-Alaska oil pipeline, including consideration of a trans-Canada pipeline.

(c) The earliest possible construction of a trans-Alaska oil pipeline from the North Slope of Alaska to Port Valdez in that State will make the extensive proven and potential reserves of low-sulfur oil available for domestic use and will best serve the national interest.

(d) A supplemental pipeline to connect the North Slope with a trans-Canada pipeline may be needed later and it should be studied now, but it should not be regarded as an alternative for a trans-Alaska pipeline that does not traverse a foreign country.

Congressional Authorization

Sec. 203. (a) The purpose of this title is to insure that, because of the extensive governmental studies already made of this project and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska oil pipeline be constructed promptly without further administrative or judicial delay or impediment. To accomplish this purpose it is the intent of the Congress to exercise its constitutional powers to the fullest extent in the authorizations and directions herein made and in limiting judicial review of the actions taken pursuant thereto.

(b) The Congress hereby authorizes and directs the Secretary of the Interior and other appropriate Federal officers and agencies to issue and take all necessary action to administer and enforce rights-of-way, permits, leases, and other authorizations that are necessary for or

related to the construction, operation, and maintenance of the trans-Alaska oil pipeline system, including roads and airstrips, as that system is generally described in the Final Environmental Impact Statement issued by the Department of the Interior on March 20, 1972. The route of the pipeline may be modified by the Secretary to provide during construction greater environmental protection.

(c) Rights-of-way, permits, leases, and other authorizations issued pursuant to this title by the Secretary shall be subject to the provisions of section 28 of the Mineral Leasing Act of 1920, as amended by title I of this Act (except the provisions of subsections (h)(1), (k), (q), (w)(2), and (x)); all authorizations issued by the Secretary and other Federal officers and agencies pursuant to this title shall include the terms and conditions required, and may include the terms and conditions permitted, by the provisions of law that would otherwise be applicable if this title had not been enacted, and they may waive any procedural requirements of law or regulation which they deem desirable to waive in order to accomplish the purposes of this title. The direction contained in section 203(b) shall supersede the provisions of any law or regulation relating to an administrative determination as to whether the authorizations for construction of the trans-Alaska oil pipeline shall be issued.

(d) The actions taken pursuant to this title which relate to the construction and completion of the pipeline system, and to the applications filed in connection therewith necessary to the pipeline's operation at full capacity, as described in the Final Environmental Impact Statement of the Department of the Interior, shall be taken without further action under the National Environmental Policy Act of 1969; and the actions of the Federal officers concerning the issuance of the necessary rights-of-way, permits, leases, and other authorizations for construction

and initial operation at full capacity of said pipeline system shall not be subject to judicial review under any law except that claims alleging the invalidity of this section may be brought within sixty days following its enactment, and claims alleging that an action will deny rights under the Constitution of the United States, or that the action is beyond the scope of authority conferred by this title, may be brought within sixty days following the date of such action. A claim shall be barred unless a complaint is filed within the time specified. Any such complaint shall be filed in a United States district court, and such court shall have exclusive jurisdiction to determine such proceeding in accordance with the procedures hereinafter provided, and no other court of the United States, of any State, territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any such claim whether in a proceeding instituted prior to or on or after the date of the enactment of this Act. Any such proceeding shall be assigned for hearing at the earliest possible date, shall take precedence over all other matters pending on the docket of the district court at that time, and shall be expedited in every way by such court. Such court shall not have jurisdiction to grant any injunctive relief against the issuance of any right-of-way, permit, lease, or other authorization pursuant to this section except in conjunction with a final judgment entered in a case involving a claim filed pursuant to this section. Any review of an interlocutory or final judgment, decree, or order of such district court may be had only upon direct appeal to the Supreme Court of the United States.

(e) The Secretary of the Interior and the other Federal officers and agencies are authorized at any time when necessary to protect the public interest, pursuant to the authority of this section and in accordance with its provisions, to amend or modify any right-of-way,

permit, lease, or other authorization issued under this title.

LIABILITY

Sec. 204. (a)(1) Except when the holder of the pipeline right-of-way granted pursuant to this title can prove that damages in connection with or resulting from activities along or in the vicinity of the proposed trans-Alaskan pipeline right-of-way were caused by an act of war or negligence of the United States, other government entity, or the damaged party, such holder shall be strictly liable to all damaged parties, public or private, without regard to fault for such damages, and without regard to ownership of any affected lands, structures, fish, wildlife, or biotic or other natural resources relied upon by Alaska Natives, Native organizations, or others for subsistence or economic purposes. Claims for such injury or damages may be determined by arbitration or judicial proceedings.

(2) Liability under paragraph (1) of this subsection shall be limited to $50,000,000 for any one incident, and the holders of the right-of-way or permit shall be liable for any claim allowed in proportion to their ownership interest in the right-of-way or permit. Liability of such holders for damages in excess of $50,000,000 shall be in accord with ordinary rules of negligence.

(3) In any case where liability without fault is imposed pursuant to this subsection and the damages involved were caused by the negligence of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damage occurred.

(4) Upon order of the Secretary, the holder of a right-of-way or permit shall provide emergency subsistence and other aid to an affected Alaska Native, Native organization, or other person pending expeditious filing of, and determination of, a claim under this subsection.

(5) Where the State of Alaska is the holder of a right-of-way or permit under this title, the State shall not be subject to the provisions of subsection 204(a), but the holder of the permit or right-of-way for the trans-Alaska pipeline shall be subject to that subsection with respect to facilities constructed or activities conducted under rights-of-way or permits issued to the State to the extent that such holder engages in the construction, operation, maintenance, and termination of facilities, or in other activities under rights-of-way or permits issued to the State.

(b) If any area within or without the right-of-way or permit area granted under this title is polluted by any activities conducted by or on behalf of the holder to whom such right-of-way or permit was granted, and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant shall be at the expense of such holder, including any administrative and other costs incurred by the Secretary or any other Federal officer or agency. Upon failure of such holder to adequately control and remove such pollutant, the Secretary, in cooperation with other Federal, State, or local agencies, or in cooperation with such holder, or both, shall have the right to accomplish the control and removal at the expense of such holder.

(c)(1) Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) and the Trans-Alaska Pipeline Liability Fund established by this subsection, shall be strictly liable without regard to fault in accordance with the provisions of this subsection for all damages, including clean-up costs, sustained by any person

or entity, public or private, including residents of Canada, as the result of discharges of oil from such vessel.

(2) Strict liability shall not be imposed under this subsection if the owner or operator of the vessel, or the Fund, can prove that the damages were caused by an act of war or by the negligence of the United States or other governmental agency. Strict liability shall not be imposed under this subsection with respect to the claim of a damaged party if the owner or operator of the vessel, or the Fund, can prove that the damage was caused by the negligence of such party.

(3) Strict liability for all claims arising out of any one incident shall not exceed $100,000,000. The owner and operator of the vessel shall be jointly and severally liable for the first $14,000,000 of such claims that are allowed. Financial responsibility for $14,000,000 shall be demonstrated in accordance with the provisions of section 311(p) of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1321(p)) before the oil is loaded. The Fund shall be liable for the balance of the claims that are allowed up to $100,000,000. If the total claims allowed exceed $100,000,000, they shall be reduced proportionately. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.

(4) The Trans-Alaska Pipeline Liability Fund is hereby established as a non-profit corporate entity that may sue and be sued in its own name. The Fund shall be administered by the holders of the trans-Alaska pipeline right-of-way under regulations prescribed by the Secretary. The Fund shall be subject to an annual audit by the Comptroller General, and a copy of the audit shall be submitted to the Congress.

(5) The operator of the pipeline shall collect from the owner of the oil at the time it is loaded on the vessel

a fee of five cents per barrel. The collection shall cease when $100,000,000 has been accumulated in the Fund, and it shall be resumed when the accumulation in the Fund falls below $100,000,000.

(6) The collections under paragraph (5) shall be delivered to the Fund. Costs of administration shall be paid from the money paid to the Fund, and all sums not needed for administration and the satisfaction of claims shall be invested prudently in income-producing securities approved by the Secretary. Income from such securities shall be added to the principal of the Fund.

(7) The provisions of this subsection shall apply only to vessels engaged in transportation between the terminal facilities of the pipeline and ports under the jurisdiction of the United States. Strict liability under this subsection shall cease when the oil has first been brought ashore at a port under the jurisdiction of the United States.

(8) In any case where liability without regard to fault is imposed pursuant to this subsection and the damages involved were caused by the unseaworthiness of the vessel or by negligence, the owner and operator of the vessel, and the Fund, as the case may be, shall be subrogated under applicable State and Federal laws to the rights under said laws of any person entitled to recovery hereunder. If any subrogee brings an action based on unseaworthiness of the vessel or negligence of its owner or operator, it may recover from any affiliate of the owner or operator, if the respective owner or operator fails to satisfy any claim by the subrogee allowed under this paragraph.

(9) This subsection shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements.

(10) If the Fund is unable to satisfy a claim asserted and finally determined under this subsection, the Fund may borrow the money needed to satisfy the claim from any commercial credit source, at the lowest available rate of interest, subject to approval of the Secretary.

(11) For purposes of this subsection only, the term "affiliate" includes—

(A) Any person owned or effectively controlled by the vessel owner or operator; or

(B) Any person that effectively controls or has the power effectively to control the vessel owner or operator by—

(i) stock interest, or

(ii) representation on a board of directors or similar body, or

(iii) contract or other agreement with other stockholders, or

(iv) otherwise; or

(C) any person which is under common ownership or control with the vessel owner or operator.

(12) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or an unincorporated organization.

ANTITRUST LAWS

Sec. 205. The grant of a right-of-way, permit, lease, or other authorization pursuant to this title shall grant no immunity from the operation of the Federal anti-trust laws.

ROADS AND AIRPORTS

Sec. 206. A right-of-way, permit, lease, or other authorization granted under section 203(b) for a road or

airstrip as a related facility of the trans-Alaska pipeline may provide for the construction of a public road or airstrip.

TITLE III—NEGOTIATIONS WITH CANADA

Sec. 301. The President of the United States is authorized and requested to enter into negotiations with the Government of Canada to determine—

(a) the willingness of the Government of Canada to permit the construction of pipelines or other transportation systems across Canadian territory for the transport of natural gas and oil from Alaska's North Slope to markets in the United States, including the use of tankers by way of the Northwest Passage;

(b) the need for intergovernmental understandings, agreements, or treaties to protect the interests of the Governments of Canada and the United States and any party or parties involved with the construction, operation, and maintenance of pipelines or other transportation systems for the transport of such natural gas or oil;

(c) the terms and conditions under which pipelines or other transportation systems could be constructed across Canadian territory;

(d) the desirability of undertaking joint studies and investigations designed to insure protection of the environment, reduce legal and regulatory uncertainty, and insure that the respective energy requirements of the people of Canada and of the United States are adequately met;

(e) the quantity of such oil and natural gas from the North Slope of Alaska for which the Government of Canada would guarantee transit; and

(f) the feasibility, consistent with the needs of other sections of the United States, of acquiring additional energy from other sources that would make unnecessary the shipment of oil from the Alaska pipeline by tanker into the Puget Sound area.

The President shall report to the House and Senate Committees on Interior and Insular Affairs the actions taken, the progress achieved, the areas of disagreement, and the matters about which more information is needed, together with his recommendations for further action.

Sec. 302. (a) The Secretary of the Interior is authorized and directed to investigate the feasibility of one or more oil or gas pipelines from the North Slope of Alaska to connect with a pipeline through Canada that will deliver oil or gas to United States markets.

(b) All costs associated with making the investigations authorized by subsection (a) shall be charged to any future applicant who is granted a right-of-way for one of the routes studied. The Secretary shall submit to the House and Senate Committees on Interior and Insular Affairs periodic reports of his investigation, and the final report of the Secretary shall be submitted within two years from the date of this Act.

Sec. 303. Nothing in this title shall limit the authority of the Secretary of the Interior or any other Federal official to grant a gas or oil pipeline right-of-way or permit which he is otherwise authorized by law to grant.

TITLE IV—MISCELLANEOUS

VESSEL CONSTRUCTION STANDARDS

Sec. 401. Section 4417a of the Revised Statutes of the United States (46 U.S.C. 391a), as amended by the Ports

and Waterways Safety Act of 1972 (86 Stat. 424, Public Law 92-340),[93] is hereby amended as follows:

"(C) Rules and regulations published pursuant to subsection (7)(A) shall be effective not earlier than January 1, 1974, with respect to foreign vessels and United States-flag vessels operating in the foreign trade, unless the Secretary shall earlier establish rules and regulations consonant with international treaty, convention, or agreement, which generally address the regulation of similar topics for the protection of the marine environment. In absence of the promulgation of such rules and regulations consonant with international treaty, convention, or agreement, the Secretary shall establish an effective date not later than January 1, 1976, with respect to foreign vessels and United States-flag vessels operating in the foreign trade, for rules and regulations previously published pursuant to this subsection (7) which he then deems appropriate. Rules and regulations published pursuant to subsection (7)(A) shall be effective not later than June 30, 1974, with respect to United States-flag vessels engaged in the coastwise trade."

VESSEL TRAFFIC CONTROL

Sec. 402. The Secretary of the Department in which the Coast Guard is operating is hereby directed to establish a vessel traffic control system for Prince William Sound and Valdez, Alaska, pursuant to authority contained in title I of the Ports and Waterways Safety Act of 1972 (86 Stat. 424, Public Law 92-340).

CIVIL RIGHTS

Sec. 403. The Secretary of the Interior shall take such affirmative action as he deems necessary to assure that no person shall, on the grounds of race, creed, color,

[93] 46 U.S.C.A. § 391a.

national origin, or sex, be excluded from receiving, or participating in any activity conducted under, any permit, right-of-way, public land order, or other Federal authorization granted or issued under title II. The Secretary of the Interior shall promulgate such rules as he deems necessary to carry out the purposes of this subsection and may enforce this subsection, and any rules promulgated under this subsection, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964.

Confirmation of the Head of the Mining Energy Policy Office

Sec. 404. The Director of the Energy Policy Office in the Executive Office of the President shall be appointed by the President, by and with the advice and consent of the Senate: *Provided*, That if any individual who is serving in this office on the date of enactment of this Act is nominated for such position, he may continue to act unless and until such nomination shall be disapproved by the Senate.

Confirmation of the Head of th Mining Enforcement and Safety Administration

Sec. 405. The head of the Mining Enforcement and Safety Administration established pursuant to Order Numbered 2953 of the Secretary of the Interior issued in accordance with the authority provided by section 2 of Reorganization Plan Numbered 3 of 1950 (64 Stat. 1262)[94] shall be appointed by the President, by and with the advice and consent of the Senate: *Provided*, That if any individual who is serving in this office on the date

[94] 11 U.S.C.A. § 1451 note.

of enactment of this Act is nominated for such position, he may continue to act unless and until such nomination shall be disapproved by the Senate.

Exemption of First Sale of Crude Oil and Natural Gas of Certain Leases From Price Restraints and Allocation Programs

Sec. 406. (a) The first sale of crude oil and natural gas liquids produced from any lease whose average daily production of such substances for the preceding calendar month does not exceed ten barrels per well shall not be subject to price restraints established pursuant to the Economic Stabilization Act of 1970, as amended, or to any allocation program for fuels or petroleum established pursuant to that Act or to any Federal law for the allocation of fuels or petroleum.

(b) To qualify for the exemption under this section, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

(c) The agency designated by the President or by law to implement any such fuels or petroleum allocation program is authorized to conduct inspections to insure compliance with this section and shall promulgate and cause to be published regulations implementing the provisions of this section.

Advance Payments to Alaska Natives

Sec. 407. (a) In view of the delay in construction of a pipeline to transport North Slope crude oil, the sum of $5,000,000 is authorized to be appropriated from the United States Treasury into the Alaska Native Fund every six months of each fiscal year beginning with the fiscal year ending June 30, 1976, as advance payments

chargeable against the revenues to be paid under section 9 of the Alaska Native Claims Settlement Act, until such time as the delivery of North Slope crude oil to a pipeline is commenced.

(b) Section 9 of the Alaskan Native Claims Settlement Act[35] is amended by striking the language in subsection (g) thereof and substituting the following language: "The payments required by this section shall continue only until a sum of $500,000,000 has been paid into the Alaska Native Fund less the total of advance payments paid mto the Alaska Native Fund pursuant to section 407 of the Trans-Alaska Pipeline Authorization Act. Thereafter, payments which would otherwise go into the Alaska Native Fund will be made to the United States Treasury as reimbursement for the advance payments authorized by section 407 of the Trans-Alaskan Pipeline Authorization Act. The provisions of this section shall no longer apply, and the reservation required in patents under this section shall be of no further force and effect, after a total sum of $500,000,000 has been paid to the Alaska Native Fund and to the United States Treasury pursuant to this subsection."

* * * *

EQUITABLE ALLOCATION OF NORTH SLOPE CRUDE OIL

Sec. 410. The Congress declares that the crude oil on the North Slope of Alaska is an important part of the Nation's oil resources, and that the benefits of such crude oil should be equitably shared, directly or indirectly, by all regions of the country. The President shall use any authority he may have to insure an equitable allocation of available North Slope and other crude oil resources and petroleum products among all regions and all of the several States.

[35] 43 U.S.C.A. § 1608(g).

SEPARABILITY

Sec. 411. If any provision of this Act or the applicability thereof is held invalid the remainder of this Act shall not be affected thereby.

Approved Nov. 16, 1973.

DEC 30 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1977

ALYESKA PIPELINE SERVICE COMPANY, *Petitioner,*

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

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OCTOBER TERM, 1974

No. 73-1977

ALYESKA PIPELINE SERVICE COMPANY, *Petitioner,*

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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AMICUS CURIAE BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

INTEREST OF THE *AMICUS CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States, John F. Kennedy, to involve

private attorneys throughout the country in the national effort to assure equal civil rights for all Americans. The Committee's membership today includes three former Attorneys General, eleven past Presidents of the American Bar Association, two former Solicitors General, a number of law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D. C. and its offices in Jackson, Mississippi and twelve other cities, the Lawyers' Committee over the past eleven years has enlisted the services of over a thousand members of the private Bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, and the administration of justice.

The primary objective of the Lawyers' Committee is to help develop the legal resources necessary to enforce fully the civil rights of minorities and the poor. Through the efforts of the Lawyers' Committee and similar groups, a great deal of high-quality legal service has been provided by the volunteer activities of the private Bar. However, the experience of the Lawyers' Committee over the past decade compels the conclusion that these valuable but limited legal resources are inadequate by themselves to effectuate fully the basic civil rights created by Congress and embodied in the Constitution. A growing number of federal courts has reached this same conclusion. Accordingly, these courts have determined that an award of attorneys' fees to "private attorneys general" is an essential element of the relief appropriate for those who have vindicated basic rights which depend in large measure upon private enforcement.

This principle is now before this Court in the instant case. The Lawyers' Committee believes that the

issues raised in this appeal are crucial to the objective of full civil rights enforcement and therefore files this brief as *amicus curiae*, first, to trace the development of principles relating to the awarding of attorneys' fees in civil rights cases, and second, to show their relevance in this case. The written consent of the parties, pursuant to Rule 42(2), Rules of the Supreme Court of the United States, is filed herewith.

SUMMARY OF ARGUMENT

It is unquestionably true that federal courts have the authority to award attorneys' fees as an appropriate element of equitable relief. Until recently, the federal courts have exercised this equitable power most frequently either where the party upon whom the fees are imposed has conducted the litigation in "bad faith" or where the successful litigant has in effect conferred a benefit upon the party compelled to pay.

However, a third equitable consideration has emerged in cases where private litigants have shouldered the heavy burden of enforcing basic rights of national importance, often with little or no prospect of financial recovery. In such cases, many lower courts have substantially expanded the boundaries of the traditional fee shifting doctrines to allow for fee recoveries by such litigants. Growing numbers of federal courts have explicitly recognized this equitable consideration as a distinct and independently sufficient ground, awarding fees to litigants who have acted as such "private attorneys general." Although this Court has never explicitly adopted this doctrine, it has recognized the strength of its underlying rationale—the necessity of such a recovery to effectuate basic substantive rights created by Congress or embodied in the Constitution.

The "private attorney general" doctrine rests firmly upon the historic responsibility of federal courts to fashion an effective remedy for federal rights. Where basic civil rights such as those against racial segregation and discrimination are substantially dependent upon private enforcement, the realization of those rights can become an illusory promise if adequate legal resources are not available to correct their abridgement. Although a significant commitment has been undertaken over the years by the private Bar to provide such resources with little or no compensation, the ability of the private Bar to absorb these often complex, protracted and expensive non-paying matters is limited. The enforcement of basic rights should not be left to rest upon such fortuitous resources.

The discretion of courts of first instance, in this case the Court of Appeals, in awarding attorneys' fees is necessarily broad since the essential considerations of fairness and necessity are best determined by the court which has determined the merits of the case. The Court of Appeals did not abuse its discretion in this case in finding that respondents have acted as "private attorneys general" vindicating strong national policies and conferring substantial benefits upon the entire nation. The Court of Appeals correctly assessed the "success" of the respondents on the basis of what the litigation accomplished in fact. Similarly, the Court of Appeals was correct in rejecting the contention, here pressed by petitioner, that the amount of the fees recoverable should vary depending upon whether the attorney involved engages in such *pro bono publico* litigation as a part of his regular private practice or as a staff attorney for a non-profit litigating organization. The Court of Appeals applied the fair and workable principle that fee awards, where

appropriate, should be based upon the reasonable value of the attorney's services. Finally, the Court of Appeals did not abuse its discretion in finding that, under the particular facts of this case, an award of attorneys' fees against this petitioner was reasonable.

ARGUMENT

I. FEDERAL COURTS HAVE THE EQUITABLE POWER TO AWARD ATTORNEYS' FEES TO "PRIVATE ATTORNEYS GENERAL" WHO HAVE ENFORCED STRONG NATIONAL POLICIES THEREBY CONFERRING SUBSTANTIAL BENEFIT ON A LARGE SEGMENT OF THE PUBLIC.

The long-standing American rule that private litigants bear the costs of the attorneys they retain to prosecute or defend their legal rights remains the practice in the vast bulk of legal disputes.[1] However, it is just as firmly established that "[a]llowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts." *Sprague* v. *Ticonic Nat. Bank*, 307 U.S. 161, 164 (1939). "[T]he current of authority is uniform and unequivocal." *Id.* at 165 n.2.[2]

In a growing number of statutes, Congress has specifically indicated that suits arising thereunder are appropriate situations for the exercise of judicial discretion to award attorneys' fees.[3] Moreover, a number

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[1] *See F. D. Rich Co.* v. *United States, ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974).

[2] *See also Trustees* v. *Greenough*, 105 U.S. 527, 536 (1881); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 392-393 (1970). Indeed petitioner concedes the existence of such equitable power on the part of federal courts. *Brief for the Petitioner* at 13.

[3] Some statutory attorneys' fees provisions are mandatory in their operation, thereby withdrawing the courts' discretion. *See, e.g.*, 7 U.S.C. § 210(f) (Packers and Stockyards Act of 1921); 7 U.S.C. § 499g(b) (Perishable Agricultural Commodities Act of 1930); 45 U.S.C. § 153(p) (Railway Labor Act of 1926); 49

of courts, in cases arising under statutes which do not provide for an award of attorneys' fees, have looked to closely related statutes that contain fee award provisions and have drawn from these statutory analogies support for the exercise of their equitable powers. Thus, in *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971), a suit under the Civil Rights Act of 1866, 42 U.S.C. § 1982, challenging discrimination in the sale of real estate, the court looked to the provision for attorneys' fees in the Fair Housing Act of 1968, 42 U.S.C. § 3612(c), a statute which embodies policies substantially similar to those involved in *Lee*. In awarding attorneys' fees to the plaintiffs the court stated:

> [I]n fashioning an effective remedy for the rights declared by Congress one hundred years ago, courts should look not only to the policy of the enacting Congress but also to the policy embodied in closely related legislation. [444 F.2d at 146.]

Similarly, many courts which have awarded attorneys' fees in employment discrimination cases arising under 42 U.S.C. §§ 1981 and 1983 have found support for the exercise of their equitable power from the statutory

U.S.C. § 16(2) (Interstate Commerce Act of 1887). However, a larger number of statutory attorneys' fees provisions—particularly those relating to cases involving a broad public interest—simply authorize federal courts to exercise their discretion to award fees, a discretion this Court has indicated should be exercised in favor of fee awards. *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). *See, e.g.*, 42 U.S.C. § 2000a-3(b) (Civil Rights Act of 1964, Title II); 42 U.S.C. § 2000e-5(k) (Civil Rights Act of 1964, Title VII); 42 U.S.C. § 3612(c) (Fair Housing Act of 1968, § 812); 20 U.S.C. § 1617 (Emergency School Aid Act of 1972, § 718); 29 U.S.C. § 501(b) (Labor-Management Reporting and Disclosure Act of 1959, § 102); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act Amendments of 1974, § 4e); 5 U.S.C. § 552(g)(2)(B) (Privacy Act of 1974, § 2(g)(2)(B)).

provision for fee awards in Title VII of the Civil Rights Act of 1964.[4]

Even in the absence of any legislative provision for fee awards—either explicit or implied—the federal courts have recognized several limited, but nonetheless vital, situations in which an award of attorneys' fees is necessary to assure "equity and justice."[5] Until recently, the most prominent of these judicially created exceptions involved two types of cases: first, where the party upon whom the fees were imposed had acted "in bad faith;" or second, where the plaintiff has succeeded in creating a "common fund" for the benefit of

[4] *See Cooper* v. *Allen*, 467 F.2d 836 (5th Cir. 1972); *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974); *Harper* v. *Mayor & City Council of Baltimore*, 359 F. Supp. 1187 (D. Md.), *aff'd*, 486 F.2d 1134 (4th Cir. 1973). *Cf. Northcross* v. *Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973).

[5] *Trustees* v. *Greenough*, *supra*, 105 U.S. at 536. Certainly, courts cannot exercise their equitable power to award fees in the face of legislative enactments precluding them. Thus, in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 719 (1967), this Court found such a prohibition in the "meticulously detailed" scheme of remedies provided by Congress in the Lanham Act, 15 U.S.C. §§ 1051-1127, under which the case arose. However, in *Mills* v. *Electric Auto-Lite Co.*, *supra*, 396 U.S. at 390-391, the Court made clear that the mere absence of specific statutory authorization for fee awards does not preclude a court from awarding them, even where other provisions of the Act under which suit is brought do provide for fees. *See also Hall* v. *Cole*, 412 U.S. 1, 9-11 (1973). As the Court stated in *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946):

> [T]he comprehensiveness of * * * equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

others and thus a shift in the fees merely served to impose them on the real beneficiaries of the lawsuit. However, courts have steadily expanded the boundaries of the "bad faith" and "common fund" doctrines to accommodate a third overriding equitable consideration—the effectuation of basic national policies that are significantly dependent upon private enforcement. Many courts have explicitly recognized this as an additional and distinct rationale for awarding attorneys' fees (*see* pp. 15-16, *infra*).

The "bad faith" principle for shifting the costs of attorneys' fees is based upon the wrongdoing of the party compelled to pay and is punitive in purpose.[6] Courts have applied this rationale against a party who has acted "vexatiously, wantonly, or for oppressive reasons."[7] However, particularly in cases enforcing the basic national goal of desegregation, many courts have found "bad faith" in far less egregious conduct. For example, in *Cato* v. *Parham*, 293 F. Supp. 1375 (E.D. Ark.), *aff'd*, 403 F.2d 12 (8th Cir. 1968), the court, although it specifically "[did] not impugn the Board's good faith in trying to carry out the mandate of the *Brown* decisions, as the Board understood that mandate," nonetheless justified an award of attorneys' fees on what might be called a "quasi-bad faith" rationale:

> [I]t cannot be gainsaid that whatever progress has been made in the direction of desegregation at Dollarway has followed judicial prodding. [293 F. Supp. at 1378.[8]]

[6] *Hall* v. *Cole*, *supra*, 412 U.S. at 5.

[7] 6 J. Moore, *Federal Practice* ¶ 54.77[2], at 1709 (2d ed. 1972).

[8] *See also Bell* v. *School Bd.*, 321 F.2d 494, 500 (4th Cir. 1963) (*en banc*); *Rolfe* v. *County Bd. of Educ.*, 282 F. Supp. 192 (E.D. Tenn. 1966), *aff'd*, 391 F.2d 77 (6th Cir. 1968).

This same impulse to expand the familiar grounds for fee shifting in situations where private litigants have enforced basic national policies and benefited an important public interest is apparent from an examination of the development of the second major equitable doctrine under which courts award attorneys' fees —the "common fund" rationale. The earliest applications of the "common fund" principle involved cases where a litigant had, by the prosecution of his lawsuit, created a monetary fund on behalf of others as well as himself. *See, e.g., Trustees* v. *Greenough, supra.* The courts reasoned that it simply would be unfair to permit others to enjoy the benefits of the plaintiff's efforts without also imposing upon them their share of the costs associated with the achievement of those benefits. *Trustees* v. *Greenough, supra,* 105 U.S. at 532. However, like the "bad faith" rationale, the dimensions of the "common fund" doctrine have been substantially expanded to accommodate additional equitable considerations. In *Sprague* v. *Ticonic Nat. Bank, supra,* the Court held that the "common fund" rationale for fee shifting does not depend upon the existence of a formal class on whose behalf plaintiff sued or upon the actual creation of a "fund." Plaintiff had succeeded in establishing a lien on the proceeds of bonds that had been earmarked as security for her trust deposit with defendant bank. The Court noted:

> [W]hen such a fund is for all practical purposes created for the benefit of others [fourteen other trusts tied to the same bonds], the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. [307 U.S. at 167.]

The "common fund" doctrine became a "common benefit" doctrine with *Mills* v. *Electric Auto-Lite Co., supra.* Plaintiffs, minority shareholders of Auto-Lite, had succeeded in establishing that "proxies necessary to approval of the merger [of its company into another] were obtained by means of a materially misleading solicitation" in violation of the proxy provisions of the Securities and Exchange Act of 1934. 396 U.S. at 386. Notwithstanding the fact that the "benefit" conferred upon the shareholders by the lawsuit was non-pecuniary in nature, the Court held that:

> [P]etitioners have rendered a substantial service to the corporation and its shareholders. * * * To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class who has benefited from them and that would have had to pay them had it brought the suit. [*Id.* at 396-397.[9]]

Although the "common benefit" doctrine which evolved out of *Sprague* and *Mills* generally has been understood to rest solely upon an "unjust enrichment" principle,[10] *i.e.*, that those who benefit from the lawsuit

[9] *See also Hall* v. *Cole, supra*, where this Court applied the same rationale for fee shifting in a suit by a member against his union for violation of his right to free speech protected by § 102 of the Labor-Management Reporting and Disclosure Act of 1959. Respondent "necessarily rendered a substantial service to his union as an institution and all of its members." 412 U.S. at 8.

[10] *See, e.g., F. D. Rich Co.* v. *Industrial Lumber Co., supra*, 417 U.S. at 129–30, wherein the Court stated that one of the recognized exceptions to the general rule is "where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class." *See also Hall* v. *Cole, supra*, 412 U.S. at 5–6. Indeed, the Court of Appeals in the instant case rejected the "common benefit" rationale because "imposing attorneys' fees on Alyeska will not operate to spread the costs of litigation proportionately among these beneficiaries, the key requirement of the 'common benefit' theory." *Wilderness Society* v. *Morton*, 495 F.2d 1026, 1029 (D.C. Cir. 1974) [hereinafter cited as *Wilderness Society II*].

should share proportionately in its costs, it is important to recognize that the costs of the lawsuit in *Mills* were imposed in part upon those who were not beneficiaries of the plaintiffs' efforts, except as the public generally benefited. The Court explicitly stated that the burden of the attorney fee award could be imposed upon the successor corporation,[11] notwithstanding the fact that the only benefit to the pre-existing shareholders of the acquiring company was the general benefit to all shareholders everywhere from the enforcement of honest corporate suffrage.[12] It is apparent that equitable considerations broader than simply "unjust enrichment" were involved in the fee award in *Mills.* The case is better understood as also resting heavily upon the Court's recognition that the equity power to award fees should be exercised to help effectuate the strong Congressional policy of "fair

[11] *Mills* v. *Electric Auto-Lite Co., supra*, 396 U.S. at 390.

[12] Similarly, in *Sprague*, the costs of the lawsuit were imposed in part upon those who not only were not beneficiaries but who were affected adversely by the litigation. Liability for the fees in *Sprague* fell upon the defendant bank which was in receivership. *See Sprague* v. *Picher*, 23 F. Supp. 59 (D. Me. 1938). However, by establishing a priority claim to the proceeds of the previously sold bonds on behalf of herself and her fourteen fellow trust depositors, plaintiff not only failed to benefit the bank's shareholders or its unsecured depositors but established a right that was adverse to their interests. The Court was aware of this consideration, *Sprague* v. *Ticonic Nat. Bank, supra*, 307 U.S. at 167, but apparently felt that there could be overriding equitable factors that would nonetheless warrant a fee award.

and informed corporate suffrage." As the Court stated:

> [T]he stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its stockholders. * * * [P]rivate stockholders' actions of this sort "involve corporate therapeutics," and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute. [396 U.S. at 396; footnotes omitted.[13]]

As *Mills* demonstrates, much of the impulse to extend the traditional rationales for fee awards has come from the judicial perception that it is both appropriate and necessary for courts to exercise their equitable power to award fees in a third, often related, but nonetheless distinct situation, namely, where strong national policies would not be fully enforced if private

[13] Similarly, in *Hall* v. *Cole*, *supra*, although the Court rested its decision on what was essentially a "common benefit" theory, the benefit conferred by the plaintiffs' enforcement of the union democracy policies of the Labor-Management Reporting and Disclosure Act of 1959, § 102, redounded equally to all union members, not merely to those of the defendant union. That the Court was concerned, not merely with "unjust enrichment" to the members of the defendant union, but also with the desirability of attorney fee awards to help effectuate the strong policies of the Act is apparent from its citation, with approval, of the language of *Gartner* v. *Soloner*, 384 F.2d 348 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968). That case involved the same statute and adopted the "private attorney general" rationale. This Court noted:

> [I]t is simply "untenable to assert that in establishing the bill of rights under the Act Congress intended to have those rights diminished by the inescapable fact that an aggrieved union member would be unable to finance litigation. . . ." *Gartner* v. *Soloner*, *supra*, at 355. [*Hall* v. *Cole*, *supra*, 412 U.S. at 13-14.]

litigants were forced to bear the costs of enforcement. This consideration at times co-exists with "bad faith" on the part of the other party; in other instances, the party upon whom the costs are imposed is indeed the true beneficiary of the lawsuit. However, circumstances enabling courts to rely upon the "bad faith" and "common benefit" doctrines are not always present.[14]

In *Newman* v. *Piggie Park Enterprises*, *supra*, this Court recognized the strength of the enforcement-

[14] For example, although in some situations a "common benefit" rationale can appropriately be applied in a suit to enforce a strong national policy against a public agency, *see*, *e.g.*, *Donahue* v. *Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973), and this Court has recently implied its support for such a rationale, *Bradley* v. *School Bd.*, 416 U.S. 696, 718 (1974), in many situations it is conceptually difficult to explain a fee award against a public agency as merely a proportionate shift of the costs of the litigation to its beneficiaries. Thus, in *LaRaza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), the "most immediate impact" of the suit was on the 5,000 residents whose homes were saved by enjoining the proposed highway; "substantial benefits" were conferred upon the 200,000 area residents whose parks were saved; and the suit had a "very real impact" on the entire Bay Area which was protected against undue housing and environmental problems in connection with the highway project. Under these circumstances, shifting the fees onto the defendant public agencies could not result in the beneficiaries paying their proportionate share. Even in *Bradley*, the district judge, in rejecting a "common benefit" rationale, pointed out that "to say that the plaintiff class will actually in effect pay their attorneys if the School Board is made to pay counsel fees entails a number of unproved assumptions about the extent to which pupils pay for their free public schooling." *Bradley* v. *School Bd.*, 53 F.R.D. 28, 35-36 (E.D. Va. 1971), *rev'd*, 472 F.2d 318 (4th Cir. 1972), *rev'd on other grounds*, 416 U.S. 696 (1974). The more realistic view, and that adopted by many of the lower courts, *see infra*, is that a fee award to plaintiffs in suits against public agencies is justified in appropriate circumstances on the basis of the "private attorney general" rationale.

necessity rationale, although not adopting it explicitly. Although the case arose under a statute in which Congress had indicated that the exercise of judicial discretion to award fees was appropriate, the Court, in setting forth the manner in which that discretion should be exercised, stressed the necessity of fee awards to effectuate the vital national policy of non-discrimination in public accommodations.

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.
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> * * *
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> It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. [390 U.S. at 401-402; footnotes omitted.]

Encouraged by the strongly suggestive authority of this Court and unwilling to distort the "bad faith" and "common fund" doctrines beyond recognition, a steady stream of lower courts has explicitly recognized the "private attorney general" principle, awarding attorneys' fees to plaintiffs who have enforced strong national policies and conferred broad public benefit.

Indeed, the availability of attorney fee awards, particularly in suits to enforce the bedrock national policies against racial segregation and discriminaton, has been a major factor in the dramatic progress that has been achieved toward those ends in the past decade. That the courts have increasingly replaced the streets as the arena for resolving the grievances arising from generations of racial discrimination can be directly traced to the landmark declarations of fundamental civil rights by the Congress and the willingness of the federal courts to use their inherent powers to shape realistic remedies for the violation of those rights. These courts have recognized that the full realization of basic rights created by Congress or embodied in the Constitution often depends upon the enforcement efforts of private litigants and that, as a practical matter, the costs of such private enforcement are frequently prohibitive. In these circumstances, growing numbers of courts have ruled that an award of attorneys' fees is an essential element of the remedy for a violation of these rights and is necessary to give them real meaning.

Thus, courts have recognized a "private attorney general" rationale for awarding attorneys' fees in the absence of specific Congressional authorization in suits to enforce: the right to free and equal suffrage, *Sims* v. *Amos*, 336 F. Supp. 924, 340 F. Supp. 691 (M.D. Ala.), *aff'd per curiam*, 409 U.S. 942 (1972);[15] the right to non-discrimination in employment, *Cooper* v. *Allen, supra; NAACP* v. *Allen, supra,* in the rental of housing, *Knight* v. *Auciello,* 453 F.2d 852 (1st Cir. 1972); *Brown* v. *Ballas,* 331 F. Supp. 1033 (N.D. Tex.

[15] Indeed, "[a]wards of attorneys' fees in reapportionment cases have become a matter of course." *Briscoe* v. *Jefferson Davis Parish Policy Jury*, No. 17,392 (W.D. La., Sept. 2, 1972).

1971), in the sale of real estate, *Lee* v. *Southern Home Sites, supra,* and in the selection of juries, *Ford* v. *White,* No. 1230(N) (S.D. Miss., Aug. 3, 1972); and the right to desegregated public education, *Bradley* v. *School Bd., supra,* 53 F.R.D. 28, and public housing, *Taylor* v. *City of Millington,* No. 71-249 (W.D. Tenn., Apr. 25, 1972), *aff'd,* 476 F.2d 599 (6th Cir. 1973).

Similarly, in appropriate circumstances courts have recognized the enforcement-necessity rationale for awarding attorneys' fees to private litigants who have vindicated other basic statutory and constitutional rights not involving racial discrimination, including: the right of involuntarily committed mentally retarded and mentally ill patients to adequate treatment, *Wyatt* v. *Stickney,* 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom. Wyatt* v. *Aderholt,* No. 72-2634 (5th Cir., Nov. 8, 1974); the constitutional rights of prisoners, *Incarcerated Men of Allen Cy.* v. *Fair,* No. 74-1052 (6th Cir., Nov. 13, 1974); the right to free speech under the First Amendment, *Stolberg* v. *Members of the Bd. of Trustees,* 474 F.2d 485 (2d Cir. 1973); the right against unreasonable searches under the Fourth Amendment, *Stanford Daily* v. *Zurcher,* 366 F. Supp. 18 (N.D. Cal. 1973); the fundamental rights of union members created by the Labor-Management Reporting and Disclosure Act, including the right to fair and democratic elections, *Yablonski* v. *United Mine Workers,* 466 F.2d 424 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 918 (1973); *Gartner* v. *Soloner, supra;* and the rights to environmental protection created by Congress, *Natural Resources Defense Council* v. *E.P.A.,* 484 F.2d 1331 (1st Cir. 1973); *LaRaza Unida* v. *Volpe, supra.*

The awarding of attorneys' fees where necessary to effectuate substantive rights created by Congress or

the Constitution rests firmly upon the long-established principle that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies,"[16] and that in the absence of a "clear command" of Congress to the contrary,[17] courts should fashion "an effective equitable remedy."[18] As this Court stated in *Bell* v. *Hood,* 327 U.S. 678 (1946):

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such an invasion, federal courts may use any available remedy to make good the wrong done. [*Id.* at 684; footnotes omitted.[19]]

Moreover, this Court held in *Virginia Ry.* v. *System Federation,* 300 U.S. 515, 552 (1937), that those equitable powers assume an even broader and more flexible character where a public interest, and not merely a private controversy, is at stake.

The "private attorney general" doctrine is based squarely upon this historic equitable foundation. It has been applied most frequently where important

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[16] *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 239 (1969).

[17] *Porter* v. *Warner Holding Co., supra,* 328 U.S. at 398.

[18] *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 414 n.13 (1968).

[19] *See also Mitchell* v. *DeMario Jewelry, Inc.,* 361 U.S. 288, 291-292 (1960):

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of statutory purposes. As this Court long ago recognized, "there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature." *Clark* v. *Smith,* 13 Pet. 195, 203.

rights created by Congress or the Constitution rely heavily upon private enforcement and where such private enforcement is impractical in the absence of a fee award since the costs of such enforcement overwhelm any potential monetary recovery.

The strong national policies against racial segregation and discrimination, for example, which spring from the Constitution and have been given structure by the Congress, have been given life largely through private enforcement. As one commentator stated:

> Although considerable efforts have been channeled through * * * public instrumentalities, the inherent limitations of restricted funding, heavily centralized bureaucratic organization and, in many instances, direct conflicts of interest, have substantially impaired their overall effectiveness. [[20]]

As noted by Judge Winter, concurring in *Brewer* v. *School Bd.*, 456 F.2d 943 (4th Cir.), *cert. denied*, 409 U.S. 892 (1972):

> Despite the extensive enforcement responsibilities the [civil rights] statutes place on the Departments of Justice and Health, Education and Welfare and their immense resources, we know from the cases which come before us that they have been unable to shoulder the entire burden of litigation to make *Brown I* fully effective. * * * Almost all of the burden of litigation has been upon the aggrieved plaintiffs and those non-profit organizations which have provided them with representation. [456 F.2d at 954.[21]]

[20] Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 Hast. L. Rev. 733 (1973).

[21] In fact, notwithstanding the "immense resources" of these Departments overall, the entire budget of the Department of Justice's Civil Rights Division for education activities in one typical recent year was only $1 million. S. Rep. No. 92-61, 92d Cong., 1st Sess., at 25 (1971). This Court has often noted the pivotal role of private enforcement in effectuating the nation's civil rights laws. *See, e.g., Newman* v. *Piggie Park Enterprises, supra*, 390 U.S. at 402.

But while it is generally acknowledged that the implementation of the civil rights laws, an objective of fundamental importance to every American, depends upon the private enforcement efforts of those aggrieved, the economics of such enforcement in the absence of fee awards frequently pose impossible barriers. Damages are often not recoverable as a legal [22] or practical [23] matter. For example, in reapportionment and desegregation suits brought under the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1983, the only relief frequently available is injunctive. And even where a monetary recovery is possible, it is often insubstantial when measured against the awesome costs of recovery.[24] For one fact has become incontrovertibly clear over the past two decades: the legal road to civil rights enforcement is often long and arduous. The legal and factual path is often uncharted, and the political, social and emotional stakes are high.

Plaintiffs' efforts to vindicate their basic right to a desegregated jury system in Marengo County, Alabama, for example, extended over nine years.[25] It took seven years to vindicate the rights of black children in Petersburg, Virginia, to a desegregated public edu-

[22] *See, e.g.*, Title II, Civil Rights Act of 1974, 42 U.S.C. § 2000 a-3(b).

[23] *See, e.g., Lee* v. *Southern Home Sites, supra; Cooper* v. *Allen, supra.*

[24] *See, e.g., Knight* v. *Auciello, supra; Hill* v. *Franklin Cy. Bd. of Educ.*, 390 F.2d 583 (6th Cir. 1968).

[25] *Jones* v. *Holliman*, No. 3944-65 (S.D. Ala., July 9, 1973).

cation.[26] And the costs of *Brown* itself have been estimated at $200,000.[27] When measured against the limited means of those aggrieved, these obstacles are not only imposing, they are often insurmountable. As pointed out by the district judge in *Bradley* v. *School Bd.*, *supra:*

> [T]his sort of case [school desegregation] is an enterprise on which any private individual should shudder to embark. No substantial damage award is ever likely, and yet the costs of proving a case for injunctive relief are high. To secure counsel willing to undertake the job of trial, including the substantial duty of representing an entire class (something which must give pause to all attorneys, sensitive as is the profession to its ethical responsibilities) necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes. Coupled with the cost of proof is the likely personal and professional cost to counsel who work to vindicate minority rights in an atmosphere of resistance or outright hostility to their efforts. [53 F.R.D. at 40.]

Under these circumstances, the availability of a recovery of attorneys' fees becomes not merely an equitable remedy, but one that is necessary to avoid "repealing the Act itself by frustrating its basic purpose." [28]

[26] *Cole* v. *School Bd.*, No. 4476-R (E.D. Va., Aug. 10, 1972).

[27] 110 Cong. Rec. 6541 (1964).

[28] *Cole* v. *Hall*, 462 F.2d 777, 780, *aff'd*, 412 U.S. 1 (1973). The Court of Appeals for the Second Circuit in that case, which involved the vindication of the congressionally created civil rights of union members, went on to say: "[w]ithout counsel fees the grant of federal jurisdiction is but a gesture for few union members would avail themselves of it." 462 F.2d at 781. *See also LaRaza Unida* v. *Volpe*, *supra*, in which the District Court stated:

> [T]hese exhortations toward citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. In many "public interest" cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder, at the thought of "taking on" an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expense rendered. The expense of litigation in such a case poses a formidable, if not insurmountable, obstacle. [57 F.R.D. at 101; footnote omitted.]

That substantial progress has been made over the recent past in securing the basic civil rights of all Americans by no means impels the conclusion that fee awards are not necessary. Indeed, in those areas which have experienced the greatest advances—for example, desegregation of public schools and reapportionment—fee awards by the lower courts to private litigants who have enforced these basic rights have become the general practice, justified either explicitly on an enforcement-necessity basis or, in some cases, on rather tortured extensions of the "bad faith" and "common benefit" principles. The realization of those rights and the evolution of this remedy have been inextricably intertwined.

In those areas where the right to recover attorneys' fees upon vindication of basic rights is less certain, it is noteworthy that many important cases have been brought. In these cases, legal representation was provided by public-minded private lawyers who were willing to undertake such cases without promise of compensation. Indeed, it has been an essential purpose of *Amicus* Lawyers' Committee for Civil Rights to enlist the services of the private Bar in such "public interest" litigation. Growing numbers of lawyers and law firms are undertaking such legal activities. It is no reflection upon them or their colleagues at the Bar, however, to acknowledge the blunt fact, inescapable from our experience over ten years, that the number

of nonpaying cases that can be absorbed in this way is only a minute fraction of those that must be brought.

It is obviously impossible to enumerate rights not vindicated and suits unbrought. However, it seems clear that the enforcement of fundamental rights should not be dependent upon the momentary supply of attorneys willing to undertake the substantial financial and professional sacrifices involved in such representation, or upon the limited and uncertain resources of a relative handful of organizations dedicated to such litigation. The right of a black child to an integrated education, or of a citizen to an equal vote, or of a mental patient to adequate medical treatment should hardly rest upon the fortuity of finding a lawyer willing to donate his professional skills. No more should it depend upon the success of last year's fund-raising effort by a non-profit litigating organization or the availability of lawyers willing to forgo the more lucrative pursuits of their profession to work for such groups. Certainly, the historical willingness of the private Bar to devote a portion of its professional resources to the representation of impecunious persons and non-pecuniary causes has been, and hopefully will continue to be, a vital hallmark of our profession. But fundamental human rights cannot be left to rest upon the charity of the Bar.

The fears commonly raised in objection to the "private attorney general" doctrine simply do not withstand close analysis. Recognition by this Court of the validity of this principle will not open the "floodgates" to litigation.[29] First, as has been previously noted, it is important to recognize that the Court has before it for

[29] *Wilderness Society II, supra*, dissent of Judge Wilkey, 495 F.2d at 1043.

consideration a doctrine that has been largely accepted by the lower courts. For this Court now to recognize the validity of the "private attorney general" doctrine would be generally to perpetuate the *status quo*, not to upset it. Second, by definition, an award of attorneys' fees under a "private attorney general" principle is only available where a private litigant succeeds in conferring a significant benefit on the nation generally or a large segment thereof. Under these circumstances, the prospect of a fee recovery can provide no additional incentive to the institution of frivolous or unmeritorious claims or those of purely private concern. Rather, to the extent that the recognition of such a principle does encourage litigation, it is litigation of a particularly worthy sort—well-conceived suits, likely of success, to enforce basic rights of general importance. Third, in many situations, eliminating the fortuity that those whose rights are about to be trammeled do not have the means to enforce them can only add a vital incentive for doing right—ultimate accountability in a court of law.

It has also been suggested that recognition of a "private attorney general" doctrine might deter the defense of lawsuits.[30] Two points should be noted. First, in many—perhaps most—cases in which the doctrine is involved, the stakes are sufficiently high for the defendant that a potential fee award against him will have no bearing at all on his decision to defend. That certainly has been the experience, for example, in the desegregation area where fee awards have been generally available from the lower courts. Second, the prospect of a fee award against a defendant will be

[30] *See Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra*, 386 U.S. at 718.

no disincentive where he believes he will win. To the extent that there is any possible disincentive effect, it could operate only where a defendant believes that there is a significant chance of losing. Thus, if there is any deterrent effect at all to the "private attorney general" doctrine, it is in effect an added incentive for defendants to settle smaller cases which plaintiffs are likely to win, a not totally undesirable result and certainly not one sufficient to override the substantial benefits flowing from such a doctrine.[31]

Finally, it has been suggested that adoption of the "private attorney general" doctrine will engage courts in the difficult job of deciding in what circumstances it applies[32] and will burden the courts with lengthy and costly determinations of proper fee awards.[33] However, application of the doctrine will proceed on a case-by-case basis, involving determinations of Congressional intent, fairness, and balances of interests not unfamiliar to the judicial process and frequently quite similar to the considerations involved in determining the merits of the case itself. In fact, the setting of reasonable fees is a task to which courts are growing increasingly accustomed, with no apparent difficulty.

[31] The concern expressed by the Court in *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* 386 U.S. at 718, that abandonment of the American rule entirely might discourage poor people from instituting suits to vindicate their rights if the penalty for losing included the fees of their opposing counsel, is not present under the "private attorney general" doctrine. As has been discussed above, fees are awarded under the doctrine to those who enforce strong national policies and confer broad public benefit. Successfully resisting such enforcement does not make one a "private attorney general," entitled to recover attorneys' fees.

[32] *Brief for the Petitioners* at 31.

[33] *See Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* 386 U.S. at 718.

As the Court noted in *F.D. Rich Co.* v. *United States, supra,* 417 U.S. at 129:

> [C]ourts have regularly engaged in that endeavor in the many contexts where fee shifting is mandated by statute, policy, or contract.

The "private attorney general" doctrine has been widely accepted by the lower courts. We strongly urge the Court now to recognize this essential principle, rooted firmly in our legal tradition and sustained by the equitable responsibility of courts to ensure justice.

II. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEYS' FEES TO RESPONDENTS IN THIS CASE

The scope of the discretion in the hands of courts of first instance in awarding attorneys' fees is necessarily broad. As this Court noted in *Trustees* v. *Greenough, supra,* 105 U.S. at 537:

> The court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have.[34]

The award of attorneys' fees is an exercise in equity, calling upon the court of first instance, in this case the Court of Appeals, to weigh and balance considerations of fairness and necessity within the context of the particular facts of the case before it. Certainly the court that has heard and determined the merits of the

[34] *See also Ojeda* v. *Hackney,* 452 F.2d 947, 948 (5th Cir. 1972); *Dyer* v. *Love,* 307 F. Supp. 974, 985 (N.D. Miss. 1969), wherein the court said: "the allowance of an attorney fee is within the sound discretion of the Court, to be exercised on the peculiar facts of each case."

case to which fees relate is in the best position to strike that balance.

The Court of Appeals, which spent five months reviewing the massive and complex record in this case, did not abuse its discretionary authority in awarding fees to respondents. Respondents instituted this lawsuit to stop the "illegal" construction[35] of a 789-mile pipeline with massive impact upon the environment and upon the utilization of 641 miles of public lands, and to compel, as required by law, a full consideration of the environmental impact of this project including alternative allocations of these monumental public and private resources.[36] When this litigation was commenced, construction was about to be undertaken in violation of Congress' explicit exercise of its exclusive constitutional authority[37] to regulate the use of public lands, and without full compliance with the basic environmental safeguards established by the Congress in the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, *Wilderness Society* v. *Hickel*, 325 F. Supp. 422, 424 (D.D.C. 1970). Congress, which is charged by the Constitution with controlling the use of public lands, had established specific limitations upon their use for pipeline construction and had explicitly prohibited any construction that deviated from those limitations.[38] Notwithstanding that exercise—and corresponding reservation—of authority by Congress,

[35] *Wilderness Society* v. *Morton*, 479 F.2d 842, 891 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973) [hereinafter cited as *Wilderness Society I*.]

[36] *Id.* at 846, 849.

[37] U. S. Const., Article 4, § 3, Cl. 2.

[38] Mineral Leasing Act of 1920, § 28, 30 U.S.C. § 185 (1970).

petitioner was about to embark upon a utilization of a vast tract of public lands in a manner that significantly deviated from Congress' intent. Respondents brought suit in part to force petitioners "to go to Congress," which alone could authorize such a wholesale departure from the balance it had previously struck between public and private interests. Moreover, respondents instituted this action to prevent "the precipitous rush toward construction"[39] of the "most complex" and "most ecologically sensitive" engineering project ever attempted,[40] without full compliance with the essential safeguards embodied in NEPA.

Certainly the Court of Appeals was correct in finding that respondents, by their vigorous prosecution of this litigation, succeeded in conferring substantial benefits on every American. First, they forced petitioner to obtain the required Congressional approval for this multi-billion dollar project. In so doing, they enforced "the duty of the Executive Branch to observe the restrictions imposed by the Legislative."[41] For this was not a case involving an accommodation between Congress and the Executive at the hazy outer reaches of agency authority under a broad delegation of power. Here, the Executive was about to do precisely what Congress, in the exercise of responsibilities specifically conferred upon it by the Constitution, told the Executive it could not do.

Second, by forcing petitioner to seek Congressional approval, respondents effectuated the very policy envisioned by the Constitution in Article 4—that Congress

[39] Appellants' Memorandum in Support of Award of Expenses and Attorneys' Fees at 2, *Wilderness Society II*, *supra*.

[40] Statement of Undersecretary of the Interior William T. Pecora, contained in the Record below at P. Docs. III, Tab B, at 4.

[41] *Wilderness Society II*, *supra*, 495 F.2d at 1033.

would determine the proper balance between public and private interests in the utilization of our public lands. And when forced to reconsider the continued appropriateness of its previous judgments, Congress did far more than simply extend the width limitation of the pipeline right-of-way. It struck an entirely new balance between the sanctity and integrity of our public lands and the needs of this pipeline. As the Court of Appeals noted (*id.* at 1033), the amendments to the Mineral Leasing Act impose important new requirements on pipeline construction over public land, designed to protect the public interest. They include an end to the practice of permitting the free use of public land for such rights-of-way and require instead that the government receive "fair market value" for them; they empower the administering agency to assess against the right-of-way recipient all reasonable administrative costs of processing an application and of monitoring the right-of-way; and they impose upon the operator of a pipeline strict liability for damages resulting from use of the right-of-way and compel it to maintain a one hundred million dollar fund to satisfy any claim. "Forcing Alyeska to go to Congress to amend the 1920 Act certainly was not a sterile exercise in legal technicalities devoid of public significance." *Id.*

Third, the Court of Appeals found that respondents' "lawsuit and appeal served as a catalyst to ensure that the Department of the Interior drafted an impact statement [as required by NEPA] and that the statement was thorough and complete * * * [which] not only benefited the public's statutory right to have information about the environmental consequences of the pipeline * * * [but] also led to the refinement of environmentally protective stipulations placed as conditions on

the rights-of-way." *Id.* at 1034; footnote omitted. The benefit conferred upon the public by forcing petitioner and the government to rethink and refine their construction plans, *i.e.*, the benefit of a disaster averted, is inestimatable but immense. For as Hon. Russell E. Train, then Chairman of the President's Council on Environmental Quality and now Administrator of the Environmental Protection Agency, has acknowledged:

> The problems of constructing a pipeline across one of the most seismically active and remote areas of the world are * * * very real. These and other significant problems were simply not adequately faced in the initial proposal presented to the Department of Interior in 1969.
>
> If the pipeline had been constructed using the original design specifications, it would very likely have resulted in not only very serious environmental damage, but also serious operational problems. Indeed, the physical integrity of the pipeline itself was very much at stake.[42]

It is manifest that respondents indeed have acted as "private attorneys general," undertaking to enforce

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[42] Statement before the Joint Judicial Conference of the Eighth and Tenth Circuits, June 29, 1973, quoted at *Wilderness Society II*, *supra*, 495 F.2d at 1033 n.3. Former Secretary of the Interior Hickel has been quoted to the same effect: "That first pipeline wouldn't have just been an environmental disaster. * * * It would have been a total engineering disaster." *New York Times*, May 26, 1974, § 1, at 34, col. 4.

Congress also acknowledged the important benefits that resulted from delay, in addition to those protections specifically adopted in the Mineral Leasing Act amendments:

> [T]he risk of environmental damage * * * has been substantially lessened as a result of the stricter environmental stipulations, redundant safety systems, contingency planning and better engineering imposed upon the proposed Trans Alaska pipeline. [S. Rep. No. 93-207, 93d Cong., 1st Sess., at 18 (1973).

Congressional and constitutional policies of national consequence and conferring substantial benefits upon us all.

In light of these results, it can hardly be dispositive, as petitioner contends,[43] that the respondents succeeded in the Court of Appeals on only one of two alternative grounds, the appellate court holding that it did not have to reach the other issue in light of its determination that the injunction sought by respondents should issue in any case. It would be totally inconsistent with the realities of complex litigation, and detrimental to the effective administration of justice, to compel courts to engage in a procrustean attempt to measure "success"—and, correspondingly, entitlement to a fee recovery—merely against the yardstick of the complaint. Recognizing this, the lower courts have awarded fees where plaintiffs have won some, but not all, of the relief they originally sought;[44] where defendants, after insti-

[43] *Brief for the Petitioner* at 32 *et seq.*

[44] *See, e.g., Clark* v. *Board of Educ.*, 449 F.2d 493 (8th Cir. 1971) (*en banc*), *cert. denied*, 405 U.S. 936 (1972); *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981 (3rd Cir. 1970), *cert. denied*, 401 U.S. 911 (1971). *See also Hargrove* v. *Caddo Parish School Bd.*, No. 17,630 (W.D. La., June 13, 1972), where, notwithstanding the court's adoption of defendant school board's plan for reapportionment, it awarded attorneys' fees to plaintiff-intervenors, stating:

> [B]y their intervention and diligent efforts throughout these proceedings, [plaintiff-intervenors] have performed a service both to the Court and to the people of Caddo Parish. Plaintiff-intervenors, and the Court itself, raised the issue of the prohibition against dilution of black voting strength with which any redistricting plan must comply. Further, plaintiff-intervenors through the skill of their counsel and the use of an expert witness raised the level of accuracy of the "one-man, one-vote" mandate by demonstrating the statistical problems of employing voter registration data and made known to the Court as well as the Board the availability of block data, without which the Court-approved plan could not be designed.

tution of the lawsuit, have voluntarily changed the challenged practices;[45] where a consent decree was entered into without any stipulation of liability;[46] and where the parties have settled all, or some, of the issues raised by the plaintiff.[47]

Petitioner seeks an "objective" standard for measuring success: certainly the only realistic objective standard is what respondents have accomplished in fact. Any other formulation would merely serve needlessly to protract litigation, deter the raising of un-

[45] *See, e.g., Hammond* v. *Housing Authority & Urban Renewal Agency*, 328 F. Supp. 586 (D. Ore. 1971). *See also Yablonski* v. *United Mine Workers, supra*, wherein three of the four suits involved never went beyond the issuance of a preliminary injunction and the fourth was dismissed as moot when defendant union voluntarily adopted election rules conforming to plaintiff's requested reforms. In awarding fees in connection with all four cases, the Court of Appeals noted:

> It is not decisive in this instance that three of the suits never got beyond the issuance of preliminary injunctions, and the fourth failed even to do that. The fact is that in the former three cases the preliminary injunction was the critical step and procured all the relief required; and in the fourth case the very filing of the complaint and the holding of a hearing on the motion for a preliminary injunction effected a change of position by the defendants which warranted the court's conclusion that no mandatory order was necessary to achieve the plaintiff's aim. As all lawyers know, a lawsuit does not always have to go to final adjudication on the merits in order to be effective. Assuming the effectiveness in terms of practical results, the litigating stage attained is relevant only to the amount of the fees to be allowed, and not to the issue of whether they should be awarded at all. [466 F.2d at 431; footnote omitted.]

[46] *See, e.g., Blumenthal* v. *Lee Memorial Hospital*, No. H-70-C-5 (E.D. Ark., Aug. 6, 1971); *Incarcerated Men of Allen Cy.* v. *Fair, supra.*

[47] *See, e.g., Webb* v. *Baxley*, No. 3564-N (M.D. Ala., Jan. 18, 1973).

tested legal issues, and inject totally artificial distortions into the conduct of litigation.

The Court of Appeals also did not abuse its discretion in holding that respondents' attorneys were appropriate recipients of an attorney fee award, or that the fee should represent "the reasonable value of the services rendered."[48] As the Court of Appeals for the Fifth Circuit noted in *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970):

> What is required is not an obligation to pay attorney fees. Rather what—and all—that is required is the existence of a relationship of attorney and client, a status which exists wholly independently of compensation. [*Id.* at 538-539; footnote omitted.]

In adopting the *Miller* holding, the Court of Appeals for the Ninth Circuit reasoned:

> The policy underlying the "private attorney general" doctrine supports this conclusion. It is true that the prospect of attorneys' fees does not discourage the litigant from bringing a suit when legal representation is provided without charge. But the entity providing the free legal services will be so discouraged, and an award of attorneys' fees encourages it to bring public-minded suits when so requested by litigants who are unable to pay. Thus, an award of attorneys' fees to the organizations providing free legal services indirectly serves the same purpose as an award directly to a fee paying litigant. * * * [*Brandenburg* v. *Thompson*, 494 F.2d 885, 889 (9th Cir. 1974).[49]]

[48] *Wilderness Society II, supra*, 495 F.2d at 1036.

[49] This Court has, on several occasions, upheld an award of attorneys' fees to the NAACP Legal Defense and Education Fund, a non-profit litigating organization. *Newman* v. *Piggie Park Enterprises, supra; Northcross* v. *Memphis Bd. of Educ., supra; Bradley* v. *School Bd., supra.* Although those cases involved fee awards under statutes providing therefor, once it is determined that a fee award is appropriate under the courts' equity powers, there can be no basis for distinguishing between statutory and non-statutory cases in awarding fees to non-profit litigating groups.

See also Clark v. *American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971), where the court, in awarding attorneys' fees to plaintiff who was represented largely by the NAACP Legal Defense and Education Fund, noted:

> Whether or not [plaintiff] agreed to pay a fee and in what amount is not decisive. * * * The criterion for the court is not what the parties agreed but what is reasonable. * * *
>
> Congress certainly intended any award under the statute to be reasonable by traditional standards. It did not look, like Lear's jester, to the breath of the unfeed lawyer [sic], but considered that the prevailing litigant should be able to pay the laborer the worth of his hire. [320 F. Supp. at 711.]

In *Hoitt* v. *Vitek*, 495 F.2d 219, 221 (1st Cir. 1974), the court explained:

> None of these legitimate reasons for the exercise of the court's equitable discretion turns on the nature of an individual attorney's normal means of reimbursement. These grounds for fee awards look to the past behavior of the parties and toward encouraging legal representatives in similar situations in the future. If the sole representative of the plaintiffs below had been [New Hampshire Legal Assistance] and the district judge had reasoned, as he did, that the suit merited award under the "private attorney general" theory, we would find it difficult to discern the advancement of any legitimate policy by the denial of attorneys' fees to NHLA. * * *

See also Taylor v. *City of Millington, supra; Quad-City Community News Service, Inc.* v. *Jebens*, 334 F. Supp. 8 (S.D. Iowa 1971); *Doe* v. *Swoap*, Nos. 71-864 RFP, C-69-666 RFP (N.D. Cal., Oct. 26, 1973); *Jones* v. *Seldon's Furniture Warehouse*, 357 F. Supp. 886 (E.D. Va. 1973); *Incarcerated Men of Allen Cy.* v. *Fair, supra.*

As these courts have recognized, awarding attorneys' fees to non-profit litigating organizations on the same basis as they would be awarded to other lawyers simply advances the policy inherent in the "private

attorney general" doctrine—facilitating the vindication of basic rights and strong national interests by increasing the legal resources available for such cases. Indeed, to the extent that there are other disincentives, not strictly pecuniary, which discourage lawyers in private practice from taking such cases (for example, disruption of their regular practice, lack of expertise, or the unpopularity of the cause), preventing an expansion of the activities of these organizations may seriously frustrate the purposes of the doctrine.

Nor can the amount of a fee award logically depend upon whether or not the lawyer involved is a salaried employee of such an organization. Petitioners seem to argue that a lawyer who engages in *pro bono publico* litigation as a part of his regular private practice should recover the reasonable value of his services, but a lawyer who chooses instead to devote full time to such litigation at a reduced overall return should be limited by his salary.[50] Such a distinction is not only illogical and unfair, it is unworkable. For it certainly applies equally to a salaried associate in a private law firm who has undertaken such representation and who, under petitioner's formulation, could only recover the amount of his compensation. Are courts to engage in an economic analysis of the salary, overhead, and expense rates of non-profit litigating organizations and private law firms to determine how to make them whole? The fair, sensible and manageable rule, adopted by the Court below, is to award all attorneys the reasonable value of their services. Indeed, this has been the general practice of the lower courts which have examined the question.[51]

[50] *Brief of Petitioner* at 41.

[51] *See* cases cited at n.49, *supra*.

Finally, petitioner strenuously argues that it is not an appropriate party against whom to impose this fee award. Certainly, the determination of whether attorneys' fees should be awarded is an exercise in equity, and, accordingly, considerations of unfairness to the defendant must be weighed. As the Court noted in *Hall* v. *Cole, supra,* 412 U.S. at 9 n.13, such a consideration "is undoubtedly an important one, [but] it is relevant, not to the *power* of federal courts to award counsel fees generally, but, rather, to the exercise of the District Court's discretion on a case-by-case basis."

The Court of Appeals considered whether the award, under the particular facts of this case, would be unfair to petitioner.[52] Petitioner initiated the requests for construction permits and vigorously worked for their approval, notwithstanding the Congressional proscriptions.[53] Even after the warning of the preliminary injunction that such permits were illegal, petitioner failed to seek Congressional approval.[54] Petitioner submitted the original construction plans that are widely accepted to have been inadequate.[55] Although the delay undoubtedly cost petitioner a considerable amount of money, it also resulted in refinements, including protection of "the physical integrity of the pipeline itself," [56] which are of substantial long-term benefit to petitioner. Petitioner intervened "to protect its massive interests" and was a "major and real party at interest in this case, actively participating in

[52] *Wilderness Society II, supra,* 495 F.2d at 1036.

[53] *Wilderness Society I, supra,* 479 F.2d at 849-851.

[54] *Id.*

[55] *See* n.42, *supra*.

[56] *Wilderness Society II, supra,* 495 F.2d at 1033 n.3.

the litigation."[57] Petitioner vigorously opposed respondents' effort to restrict the court's initial considerations to the Mineral Leasing Act issues, thus requiring a full briefing of the NEPA issues never reached by the Court of Appeals.[58]

We submit that the Court of Appeals did not abuse its broad discretion in finding that it is reasonable for Alyeska to bear a portion of respondents' attorneys' fees under these factual circumstances.

CONCLUSION

For the foregoing reasons, we urge the Court to affirm the decision of the Court of Appeals and in so doing to affirm the validity of the "private attorney general" doctrine.

Respectfully submitted,

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[57] *Id.* at 1036.

[58] *Id.* at 1035.

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IN THE

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OCTOBER TERM, 1974

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Petitioner,

v.

WILDERNESS SOCIETY, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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Interest of *Amicus Curiae**

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to black persons suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own

* Letters of consent from counsel to the filing of this brief for the petitioners and the respondents have been filed with the Clerk of the Court.

behalf. The charter was approved by a New York court, and authorizes the organization to serve as a legal aid society and to receive court-awarded counsel fees. The NAACP Legal Defense and Educational Fund, Inc. is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

The Legal Defense Fund has a vital interest in the firm establishment of the "private attorney general" basis for the award of counsel fees in public interest litigation, and its attorneys have brought to this Court a number of cases dealing with the issue, including *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968); *Northcross* v. *Board of Education of Memphis City Schools*, 412 U.S. 427 (1973); *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974); and *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, No. 74-543 (petition for writ of certiorari pending). In the last ten years, since the passage of the first attorney's fees provisions in Title II and Title VII of the Civil Rights Act of 1964, the Legal Defense Fund has been able to expand significantly the scope of its program. The recovery of attorneys' fees for work done by lawyers employed by the Fund in cases involving employment, public accommodations, school desegregation, fair housing, voting rights, and other constitutional and statutory rights, provides a vitally important resource that helps to make the Fund's work possible. Although petitioner in this case disclaims any application of its arguments to civil rights cases, and does not challenge the validity of the private attorney general rule itself, its final argument, that counsel fees cannot be awarded to attorneys employed by charitable organizations would also

bar the legal Defense Fund from such awards. Thus, the Fund has a direct interest in the outcome of this case.

ARGUMENT

There Is No Bar to the Award of Counsel Fees for Work Done by Attorneys Employed by a Charitable Organization Under the Private Attorneys General Rule.

Petitioner urges, in the alternative, that the court below lacked discretion to award counsel fees in the instant case because the plaintiffs are charitable organizations established to protect the environment, and because plaintiffs' counsel were provided by other charitable organizations established to provide free legal counsel in cases such as this.

This contention is not a novel one; it has been considered and rejected by five courts of appeals. *Jordan* v. *Fusari*, 496 F.2d 646, 649 (2d Cir. 1974); *Brandenburger* v. *Thompson*, 494 F.2d 885, 889 (9th Cir. 1974); *Fairley* v. *Patterson*, 493 F.2d 598, 606-07 (5th Cir. 1974); *Natural Resources Defense Council* v. *Environmental Protection Agency*, 484 F.2d 1331, 1338 n. 7 (1st Cir. 1973); *Wilderness Society* v. *Morton*, 495 F.2d 1026 (D.C. Cir. 1974), *cert. granted sub nom., Alyeska Pipeline Service* v. *Wilderness Society*, No. 73-1977. See also, *Lea* v. *Cone Mills Corp.*, 438 F.2d 86, 88 (4th Cir. 1971).[1] Only last term, this Court affirmed an

[1] Three district courts have also rejected this argument. *Clark* v. *American Marine Corp.*, 320 F. Supp. 709, 711 (E.D. La. 1970); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 98 n. 6 (N.D. Calif. 1972); *Stephens* v. *Dobs, Inc.*, 373 F. Supp. 618, 621 (E.D. N. Car. 1974); Two district court opinions denying counsel fees on this ground were reversed by the Fifth Circuit. See, *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970), reversing an unreported decision in the Eastern District of Louisiana (West, J.); and *Fairley* v. *Patterson*, 493 F.2d 598 (5th Cir. 1974), reversing an unreported decision in the Southern District of Mississippi (Cox, J.).

award of counsel fees to a charitable organization and private counsel associated with it. *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974).

Petitioner urges first that an award of counsel fees is impermissible in this case because the plaintiffs are charitable organizations whose goals include the protection of the environment through litigation. This argument misconceives the purpose of a private attorney general rule. That rule was not fashioned to give potential plaintiffs a greater financial interest in litigation; any fees awarded are paid, not to the party itself, but to its counsel. The Wilderness Society interest in clean air or the protection of endangered species is certainly no greater than the interest of a black child in attending an integrated school. See, *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). Counsel fees are necessary to make possible the prosecution of litigation such as this where there is no realistic chance of monetary damages out of which a fee might be paid. See, *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). Petitioner does not suggest that charitable organizations in general, or the Wilderness Society in particular, have such vast resources as to be able to hire counsel to bring every public interest law suit in which they have a substantial interest. On the contrary, it is undisputed that, even in the instant case, plaintiffs were represented not by hired counsel, but by attorneys who undertook to do so without charge.

Petitioner argues in the alternative that counsel fees are inappropriate because in the instant case plaintiffs' counsel were provided by another charitable organization, the Center for Law and Social Policy. An award of counsel fees is not inappropriate merely because an organization such as the Center is interested in providing counsel in cases such as this. The practical problem confronting such

an organization is the same as that which confronts private counsel; it has severely limited resources available to expend on non-fee generating litigation. Attorneys' fees are provided, not merely to encourage such organizations to provide counsel in litigation of public importance, but also to augment their ability to do so. The fact that an organization, like a private attorney, might undertake to support a few such cases out of its own resources does not militate against awarding counsel fees to permit it to undertake more.

The ancillary benefits of the private attorney general rule are equally applicable to litigation involving charitable organizations. The rule encourages counsel to pick out from among possible *pro bono* activities those matters of significant importance. Thus, such an organization has an incentive to devote its limited resources to litigation affecting large numbers of people, not merely a handful of individual members. Ordinarily, a potential plaintiff, or an unpaid counsel, would be reluctant to undertake an action against multi-million dollar plaintiffs that can afford to wear them down through protracted litigation: the private attorney general rule tends to mitigate this problem in litigation of public importance.

Petitioner invites the Court to speculate that the existing incentives and resources available to charitable organizations are such as to make unnecessary the additional incentives and resources provided by the private attorney general rule. In fact, the handful of such organizations that exist can support only a small number of cases, compared to the many thousands of employers, industrial plants, or school districts that may be involved in violations of the law. The practical experience of these organizations is that they handle no more than a fraction of the most important problems needing attention. It would be in-

appropriate for this Court to restrict the award of counsel fees to charitable organizations based on conjecture as to how much money these organizations can raise through contributions or foundation grants, how much litigation those funds can effectively support, and how those factors will be affected in the future by such imponderables as inflation, recession, and the fluctuations of the stock market. See, *La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 98 n.6 (N.D. Calif. 1972).

The vitality of the private attorney general rule as an aid to civil rights litigation would be largely vitiated by the limitations urged by Petitioner. Despite the express Congressional sanction for counsel fees in such areas as employment discrimination, school desegregation, public accommodations, and housing, and notwithstanding this Court's liberal construction of those provisions,[2] the bulk of the litigation in such cases has continued to be brought by, or with the support of, a handful of civil rights organizations. The same is true of civil rights litigation falling under the equitable private attorney general rule. This pattern reflects the unwillingness of many attorneys, especially in the South, to undertake such litigation, the inability of most small practitioners to absorb the substantial day-to-day costs of such cases, and the essential expertise of those organizations. Not coincidentally, most of the cases in which defendants have opposed an award of counsel fees on the ground now urged by Petitioner have been civil rights cases brought by either the NAACP Legal Defense Fund or the Lawyers Committee for Civil Rights Under Law.[3] To a substantial extent, such organiza-

[2] *Newman* v. *Piggie Park Enterprises, supra; Northcross* v. *Board of Education of Memphis City Schools*, 412 U.S. 427 (1973).

[3] See, *Fairley* v. *Patterson, supra*, (Lawyers' Committee); *Miller* v. *Amusement Enterprises, supra*, (Legal Defense Fund);

tions have committed themselves to the support of particular cases and a volume of litigation on the assumption that they will be eligible for awards of counsel fees in the same circumstances as would private counsel.

Finally, the rule urged by Petitioner raises constitutional problems of considerable magnitude. A citizen aggrieved by a violation of his legal rights may often conclude that the most efficacious method of vindicating those rights is not through individual litigation, but through membership in an organization which engages in such litigation for or on behalf of its members. As this Court noted in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429 (1963):

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.

To cut off the possibility of counsel fees, and thus in many cases the possibility of obtaining the assistance of an attorney, merely because individuals seek to act through membership in such organizations, would impose an impermissible burden on the exercise of First Amendment rights. Similarly, an individual may legitimately prefer to be represented by counsel employed by or associated with a charitable organization. Such counsel may have greater expertise, a keener interest in the case, or a greater immunity from the pressures often brought to bear on counsel

Lea v. *Cone Mills, supra*, (Legal Defense Fund); *Clark* v. *American Marine, supra*, (Legal Defense Fund); *Stephens* v. *Dobbs, Inc., supra*, (Legal Defense Fund); *Thompson* v. *Madison County Board of Education*, 496 F.2d 682 (5th Cir. 1974) (Lawyers' Committee); *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974) (Legal Defense Fund).

handling unpopular cases. To restrict an individual's ability to obtain such representation by limiting awards of counsel fees to attorneys the individual does not want or trust would present an unwarranted interference with the individual's right to the assistance of counsel of his or her choice. See, *Sanders* v. *Russell*, 401 F.2d 241, 244-47 (5th Cir. 1968); *Fairley* v. *Patterson*, 493 F.2d 598, 607 n. 14 (5th Cir. 1974). Thus, the acceptance of Petitioners' argument would result in, in practical effect, the undermining of the entire purpose of the private attorney general rule.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.[4]

Respectfully submitted,

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[4] *Amicus* feels that it should call to the Court's attention an alternative basis for upholding an award of counsel fees to the Respondents, although one that would not result in their being assessed against the Petitioner. Both the parties and the court of appeals assumed throughout this aspect of the litigation that the United States is not liable for an award of counsel fees because of sovereign immunity or the provisions of 28 U.S.C. § 2412. The correctness of this assumption is challenged in *Pyramid Lake Piute Tribe* v. *Morton*, No. 74-342. That limitation applies only to an award of counsel fees directly from the Treasury, and would not bear on the propriety of such an award from a fund created by private litigation and payable to the United States. See, *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). In the instant case, plaintiffs succeeded in compelling petitioner to seek approval of the Trans-Alaska Pipeline from Congress, and Congress in turn required as a condition of that approval that Petitioner pay to the United States a sum equal to the fair market value of the right of way on which the pipeline is constructed. This sum will doubtless involve several millions of dollars, and would not have been payable to the United States had not the plaintiffs successfully prosecuted the instant litigation. *Amicus* would suggest that plaintiffs' counsel fee might properly be deducted from this sum, and if this were done, the Court need not reach the issues presented by Petitioner.

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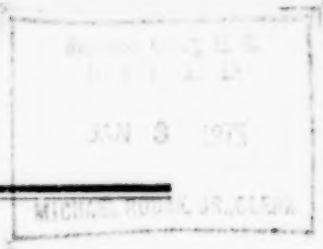

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INTEREST OF AMICI

Amici Curiae are public interest law firms which, over the past five years, have begun operation in an effort to provide representation to previously unrepresented groups.

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*Consent has been given by petitioner and respondents to the filing of this brief amici curiae. Copies of such consent have been filed with the Clerk of this Court.

Amici have participated in proceedings in state and federal courts and in a wide range of administrative agencies — from the Federal Trade Commission to the Comptroller of the Currency, from the United States Parole Board to the Federal Communications Commission. Through representation by the amici, many individuals and citizen groups who had never previously had an opportunity to participate in important decisions directly affecting their vital interests had access to the process by which these decisions are made.

Amicus Center for Law in the Public Interest, located in Los Angeles, began operations in 1971. It now has a staff of six attorneys and a budget of $300,000 per year. It is primarily engaged in providing representation in the areas of employment discrimination and environmental protection. In *Davis v. County of Los Angeles*, Civ. No. 73-63-WPG (C.D. Cal., June 7, 1973), the Center received a court-awarded fee of $60,000, a sum which now helps to pay the cost of its public interest program. Other cases in which fee awards to the Center were made are now pending on appeal.

Amicus Citizens Communications Center, Inc., is a Washington-based public interest law firm, incorporated since 1971. *Citizens* is dedicated to enabling minorities, women, and listeners to participate in proceedings before the Federal Communications Commission and to assuring that the Commission meets its statutory obligation to serve the public interest in the allocation and renewal of broadcast licenses, cable television facilities, and other forms of telecommunications. Its annual budget is $250,000. *Citizens* has a long-standing interest in the attorneys' fee issue. See *Office of Communication of United Church of Christ v. FCC*, 465 F.2d 519 (D.C. Cir. 1972) (citizen groups may accept reimbursement of costs, including attorneys' fees, in a settlement of a challenge to a license renewal);

Turner v. FCC, Case No. 74-1298 (D.C. Cir., filed February 28, 1974) (pending case involving propriety of agency-ordered attorneys' fees).

Amicus Institute for Public Interest Representation, founded in 1971, is a part of the Georgetown Law School. Its annual budget of $130,000 per year is met by a Ford Foundation grant.

Amicus Legal Action Center of the City of New York, Inc., founded in 1973, is a public interest law firm focusing on the criminal justice system, with emphasis on problems of rehabilitation. It has been active in challenging various forms of discrimination suffered by persons with histories of arrests, convictions, and drug use, particularly in employment. The Center employs six attorneys, with a budget of approximately $300,000. The Legal Action Center's ability to continue its work on a long-term basis depends on its capacity to obtain court-awarded attorneys' fees and costs in appropriate cases. Both foundation and government sources which have provided support to the Legal Action Center have insisted that the Center demonstrate its ability to develop alternative sources of funding.

Amicus Public Advocates, Inc., is a San Francisco-based firm which has a staff of seven attorneys and seven law student interns. Founded in 1971, its annual budget is approximately $400,000 per year. It represents more than 70 minority and women's organizations plus a number of senior citizens, community, and environmental groups. Public Advocates has a vital interest in the attorneys' fee issue, notwithstanding the fact that most of the firm's time is spent on matters which could in no event generate a fee. A United States Magistrate has recommended a fee of $200,000 in *W.A.C.O. v. Alioto*, Civ. No. C-70-1335 WTS (N.D. Cal.). Among the cases in which Public Advocates' attorneys have participated is *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971), in which costs

alone — not including attorneys' fees — were over $35,000[1]. According to present projections, Public Advocates will have to terminate its activities in late 1977, unless substantial attorneys' fees are received in a wide range of cases.

Amicus Sierra Club Legal Defense Fund is a public interest law firm with offices in San Francisco and Denver. It conducts an overall program of environmental protection, with strong emphasis on public land use policy. It has a full-time staff of seven attorneys and also retains a number of cooperating attorneys to handle particular cases. The Fund's operating budget is approximately $500,000. The Fund has a particular interest in recovery of attorneys' fees, because it now holds in escrow a $20,000 court-awarded attorneys' fee, awaiting an Internal Revenue Service ruling. The attorneys' fee award was made by the district court in *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973) (affirmance by an equally divided court). The question of an award of attorneys' fees to the Fund is pending in a number of other matters.

ARGUMENT

I

INTRODUCTION: CHARACTERISTICS OF PUBLIC INTEREST LAW FIRMS

Amici have in common a number of characteristics. These are shared by the Center for Law and Social Policy, which has provided lead counsel to respondents in the instant case. These characteristics include:

1. Amici have been established to provide legal services to groups and individuals who previously lacked access to

[1] Statement of J. Anthony Kline, *Hearings on Legal Fees before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93rd Cong., 1st. Sess., p. 797 (1973).

courts and administrative agencies. Amici are "public interest law firms" in the sense that by providing such representation, they invigorate the adversary process, increase the range of inputs to decision-makers, and increase the likelihood of decisions that reflect all competing interests. The term does not imply that these firms have any special knowledge of where the public interest lies or that the substantive positions held by their clients necessarily coincide with "the public interest". Their commitment is to an adversary process from which the public interest is most likely to emerge.

2. Amici are established as tax exempt organizations under Section 501(c)(3) of the Internal Revenue Code[2], under the direction of boards of trustees, which include leading members of the Bar. All conform to the IRS requirements for public interest law firms.[3] In a ruling received by amicus Public Advocates, Inc., the Internal Revenue Service has ruled that tax-exempt public interest law firms may accept attorneys' fees awarded by a court or administrative agency against opposing parties (or approved as part of a settlement). Int. Rev. Serv. Private Ruling, dated October 4, 1974. Such fees must be limited to fifty percent of the operating budget of the public interest firm. In a ruling received by amicus Citizens Communications Center, Inc., the Internal Revenue Service has ruled that tax exempt public interest law firms may not accept fees directly from clients. Int. Rev. Serv. Private Ruling, dated October 4, 1974.

[2] The Institute for Public Interest Representation is the only exception. However, while it is not a separate corporate entity but a constituent element of the Georgetown University, its operations, including the supervision of the board of trustees, are basically similar to that of firms which are tax exempt.

[3] Under the guidelines issued by the Internal Revenue Service, each public interest law firm must have a representative board of trustees, must represent broad public interests, and must report annually to the IRS on its activities. Rev. Proc. 71-39, 1971-2 C.B. 575.

3. Amici law groups are staffed by attorneys who are paid a fixed salary substantially below the rate at which they would be compensated in private practice. Salaries for experienced lawyers are generally in the $20,000 to $25,000 range. The highest salary paid to any attorney employed by amici is $32,500, and such salaries are limited to the most senior attorneys, with more than ten, and sometimes as much as thirty years' experience. Many attorneys who have come to amici groups from private firms have accepted substantial reductions in their compensation. Amici have been able to attract legal staffs of the highest professional competence, but their ability to continue to do so will depend on establishing reliable methods of obtaining funds in the future.

4. Amici rely heavily on a few foundations for their support. Amici have been generally informed by the foundations that, as in the case of many foundation projects, their support here is "seed money" and will not continue indefinitely.

> ". . . It is no secret, however, that NRDC [Natural Resources Defense Council] and other public interest firms cannot count on Ford Foundation support for any considerable time into the future. The foundation prefers to support fledgling organizations over an initial period, after which time they are expected to find the wherewithal to continue from other sources. The ability to stand on one's own feet, then, is the ultimate test of the experiment."
> Adams, "Responsible Militancy - The Anatomy of a Public Interest Law Firm," 29 The Record of the Ass'n of Bar of City of New York 631, 644 (1974).[4]

[4]See also Berlin, Roisman & Kessler," Public Interest Law", 38 G.W.L. Rev. 675, 686-87 (1970); Comment, "The New Public Interest Lawyers", 79 Yale L.J. 1069, 1148 (1970).

In addition, cutbacks in foundation support are likely in the near future because of current economic conditions.[5] Amici are each under an obligation to seek alternative sources of funding. Hence, amici have an institutional interest in the attorneys' fee awards to successful public interest litigants who bring suit to vindicate broad public interests. In addition, amici believe that the award of attorneys' fees in such cases will permit many more lawyers who are not associated with tax-exempt entities to become involved in such litigation.

5. Amici have represented citizen groups in a number of cases which have helped to clarify the meaning of ambiguous legislation, to assure that administrative decision-making followed statutory standards, and to enforce constitutional rights.[6] Amici have also participated in rule-making proceedings, informal discussions with government officials, and negotiations with private parties on behalf of various client groups. Litigation has been only one of the alternative methods of advocacy which amici have utilized.[7]

The interest of amici groups in this case does not spring exclusively from interests of institutional survival, although development of new funding sources, including attorneys' fee awards, is essential to their continuing viability. More important are the interests of the clients whom they have represented, and the public interest in having issues of public policy resolved on the basis of a full presentation of contrasting viewpoints and a robust adversary process. To meet these demands, existing public interest law programs will not be sufficient. A larger segment of the Bar will have to become involved in an expanded adversary process.

[5]"Ford Foundation to Slash Grants Over Next Four Years", N.Y. Times, December 15, 1974, p. 1.

[6]See discussion of some leading cases, *infra*, pp. 21-22.

[7]See Halpern, "Public Interest Law — Its Past and Future", 58 Judicature 118, 122-23 (1974).

The instant case illustrates one of the roles that public interest law firms have played during the past five years. Groups like the Wilderness Society and the other respondents lacked the resources to retain counsel to challenge the Trans-Alaska Pipeline, and the case was too big — and too fraught with possible conflicts of interest — for any private law firm to take it on a *pro bono* basis. Yet the Wilderness Society and its members had a vital interest in the disposition to be made by the Secretary of Interior of the Alaskan wilderness, and an equal interest in assuring that federal land laws and the newly passed National Environmental Policy Act were complied with. It was only the availability of charitably-supported counsel in public interest law firms that made it possible for the Wilderness Society to marshal the evidence and present its arguments to the Secretary and the courts forcefully, concretely, and professionally. Amici submit that the public interest was well served by having the issues fully presented in this fashion and finally submitted to Congress — after exhaustive environmental analysis triggered by this litigation.

But the likelihood of such suits being filed and litigated in the future is dependent in large measure on the resolution of the attorneys' fees aspect of the suit. Attorneys employed by the Center for Law and Social Policy, who were lead counsel in the case, are dependent on foundation support — and such support is likely to diminish in the future and, most important, cannot be counted upon indefinitely. As noted above, some of amici are already utilizing court awarded attorneys' fees to finance their continuing operations. If citizen grievances of this type are to be assured full and continuing access to the courts in the future, alternative funding sources must be developed. Specifically, the legal process itself must be structured so that participation in decision-making is economically feasible for citizen groups like the respondents. Shifting the

costs of litigation through attorneys' fee awards is a traditional and appropriate method to do so.

Amici urge the Court to affirm the Court of Appeals' award of attorneys' fees to the respondents herein. In supporting the position of respondents, amici will attempt to place this case in the broader context of the development of public interest law and the importance of attorneys' fee awards in cases of this character to the continuing vitality of a public interest bar, to the adversary process, and ultimately to our entire system of justice.

II

DEFINITION OF THE PROBLEM: THE ADVERSARY SYSTEM AND UNREPRESENTED CITIZEN INTERESTS

The American legal system is premised on the assumption that an adversary process is critical to effective and reliable decision-making. The courtroom is in this sense a microcosm of our larger political framework which assumes that the public interest will be most likely to emerge from a vigorous contest between private entities or groups pursuing their interests or the public interest as they perceive it. In the courts and regulatory agencies, however, the effectiveness of the adversary process turns on the availability of legal representation. The institutions which collectively make up the justice system have recognized that increasing the availability and quality of legal representation afforded to various segments of society is essential to the effective administration of justice. It is this perception that led to the development of "public interest law":

> "In this century, the goal of representing the unrepresented originated with a concern over the plight of 'weak minorities' in a democracy — the poor, political dissidents or victims of racial discrimination. And the earliest organized manifestations of public

> interest law — the legal aid societies, the American Civil Liberties Union and the NAACP Legal Defense and Educational Fund, Inc. — were a response to the classic problem of protecting relatively powerless minority interests from an overbearing majority through provision of legal counsel. Heineman, Book Review, "In Pursuit of the Public Interest", 84 Yale L.J. 182, 183 (1974).

The civil rights area is perhaps the most striking example of a field where availability of legal representation caused a significant shift in national policy. The history of that development is instructive, and the lesson has been written by Mr. Justice Marshall in his essay, "Group Action in the Pursuit of Justice," 44 N.Y.U.L. Rev. 661 (1969). He recounted that despite the efforts of committed members of the bar in the struggle for justice, "the need for lawyers and supporting personnel cannot be met by individual effort; the task is simply too great. The need can be met only in an organized way." *Id.* at 663. It was not until the NAACP "developed a conscious program of legal action designed to eliminate discrimination and inequality" that significant progress was shown. *Id.* at 667.

> "The financial and human resources that were funnelled into this program were in large part responsible for recent successes in striking down discriminatory laws and practices. Similar examples could be multiplied. But whichever group you examine, one thing becomes evident: the organized and committed efforts of groups of this sort has been of immeasurable importance in making our constitutional guarantees meaningful." *Id.* at 667-68.

The dimensions of the task of representing interests heretofore denied equality in the legal system by lack of

counsel has been recognized in many ways. One of these has been awards of legal fees by both courts[8] and Congress[9] to plaintiffs in civil rights cases. This policy has substantially increased the number of lawyers actively handling such cases.

As Mr. Justice Marshall remarked, beyond issues of racial injustice, we are faced with "problems peculiar to the economically and socially disadvantaged . . . . But now who is to speak for the poor, the disadvantaged, and these days, for the ordinary consumer?" *Id.* at 668. The importance of this question increases as the role of government in the life of every individual becomes pervasive. Today, federal agencies make many decisions which have vital importance in the lives of all Americans. They decide energy policy; safety requirements for atomic power plants; what chemicals may be added to our food; what advertising claims can be made. They allocate public resources for private use "in the public interest" through licensure of broadcast stations, allocation of airline, rail, and truck routes, and subsidy of marine transport. To a substantial extent, they control the availability of goods and services and the prices we must pay for them.

Analysis of the functioning of the administrative process has revealed that it was not only the "weak minorities" that were excluded from the decisional processes. Large segments of the society were effectively excluded because of their lack of resources, expertise, and legal representation. Furthermore, their interests were so diffuse that it was not

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[8] *E.g., Cornist v. Richland Parish School Board*, 495 F.2d 189 (5th Cir. 1974); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971).

[9] *E.g.*, 42 U.S.C. § 2000a-3(b) (public accommodations); 42 U.S.C. §2000e-5(k) (employment discrimination). See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

economical to pursue them.[10] The Administrative Conference of the United States has concluded that the costs of participation "can render the opportunity to participate meaningless." Recommendation 28 of the Administrative Conference of the United States - Public Participation in Administrative Hearings (adopted December 7, 1971), Par. D. See Gellhorn, "Public Participation in Administrative Proceedings," 81 Yale L.J. 359, 388-89 (1972).

Bureaucratic inertia and insensitivity necessarily follow from a lack of citizen involvement in agency decision-making processes. And the problem is exacerbated when some interests are forcefully represented while others are unrepresented.

Regulatory agencies have for many years suffered from a lack of adversariness in their proceedings. Too often the administrators hear only the industries' side of arguments and, predictably, their decisions reflect an industry slant.[11] Dean Roger Crampton, formerly Chairman of the Administrative Conference of the United States, has stated the problem as follows:

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[10]". . . with the growth of government intervention in social and economic life, the need arose to protect the interests of a 'diffuse majority' from the untoward influence on government agencies of corporate and other highly organized groups. Such influence frustrated implementation of legislation aimed at promoting a general public good . . . [and] diffuse majority interests . . . lack the resources and organizational muscle to counter expressions of power . . . by . . . concentrated centers of private power . . . ." Heineman, Book Review, "In Pursuit of the Public Interest", 84 Yale L.J. 182, 183-84 (1974).

[11]See *Thill Securities Corp. v. New York Stock Exchange*, 433 F.2d 264, 273 (7th Cir. 1970). ("[T]he history of United States regulatory agencies in general seems . . . to demonstrate that shortly following the establishment of administrative procedures the regulatory agency usually becomes dominated by the industry which it was created to regulate."); Noll, *Reforming Regulation*, pp. 31, 43-44 (Brookings Institution, 1971); Landis, *Report on Regulatory Agencies to the President-Elect*, pp. 43-44, 53, 70-72 (1960).

> "The cardinal fact that underlies the demand for broadened public participation is that governmental agencies rarely respond to interests that are not represented in their proceedings. And they are exposed, with rare and somewhat insignificant exceptions, only to the view of those who have a sufficient economic stake in a proceeding or succession of proceedings to warrant the substantial expense of hiring lawyers and expert witnesses to make a case for them. Non-economic interests or those economic interests that are diffuse in character tend to be inadequately represented, although agency staffs often make valiant efforts in this direction." Crampton, "The Why, Where and How of Broadened Public Participation in the Administrative Process," 60 Georgetown L.J. 525, 529 (1972).

Crampton then cites Lee C. White, former chairman of the Federal Power Commission, who has translated the problem into concrete terms:

> "A successful lawyer in Keokuk is appointed by the President to serve on an independent regulatory agency or as an assistant secretary of an executive department that exercises regulatory functions. A round of parties and neighborly acclaim surround the new appointee's departure from Keokuk. After the goodbyes, he arrives in Washington and assumes his high role as a regulator, believing that he is really a pretty important guy. After all, he almost got elected to Congress from Iowa. But after a few weeks in Washington, he realizes that nobody has ever heard of him or cares much what he does —

except one group of very personable, reasonable, knowledgeable, delightful human beings who recognize his true worth. These friendly fellows — all lawyers and officials of the special interests that the agency deals with — provide him with information, views, and most important, love and affection. Except they bite hard when our regulator doesn't follow the light of their wisdom. The cumulative effect is to turn his head a bit." Remarks of Lee C. White, Brookings Institution Conf. on Administrative Regulation, April 8, 1971. Quoted in Crampton, *supra* at 530, n.3.

The problem was put in sharp focus in a landmark decision written by Chief Justice (then Judge) Burger with regard to the Federal Communications Commission. In that case, a black citizens' group in Jackson, Mississippi, sought to participate in FCC proceedings to protest the renewal of the license of an allegedly racist broadcaster. The Commission excluded the citizens' group from the proceeding. The Court of Appeals reversed the Commission's ruling and delineated the right of citizen groups to participation in the proceedings of government agencies notwithstanding the agency's general mandate to puruse the public interest. The court held:

> "The theory that the Federal Communications Commission can always effectively represent the listener interests . . . without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it." *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003-04 (D.C. Cir. 1966).

The *Church of Christ* decision explicitly recognized the propriety and importance of responsible citizen groups' participating in FCC proceedings. Indeed, as a result of *Church of Christ*, it is now recognized by the FCC that the entire scheme of the Communications Act of 1934, as amended, is based on such public participation.[12] But how can there be effective public participation without adequate legal representation for the public — with only one side (the broadcasters) having skilled lawyers who have continuing expertise in communications law?[13]

Thus, in the years immediately following the *Church of Christ* decision, few citizen groups went through the door opened by the decision and participated in FCC proceedings. Moreover, the logic of the court's decision was equally applicable to other agencies whose decisions directly affected the quality of the environment, the cost of goods, and the availability of services. But few citizen groups took advantage of this new opportunity.

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[12] See, *e.g.*, *Renewal of Broadcast Licenses*, 38 *Fed. Reg.* 28762-68, 28771-73, 28778-80 (1973); Sections 309, 311(a) of the Communications Act, 47 U.S.C. §§ 309, 311(a). And in the third *Church of Christ* case, 465 F.2d 519, 527 (1972), the court, relying upon the two prior *Church of Christ* cases, stated: "In recent years, the concept that public participation in decisions which involve the public interest is not only valuable but indispensable has gained increasing support".

[13] See *Richard Turner*, 45 FCC2d 377, 386 (1974), (dissenting opinion of Commissioner Hooks) ". . . it is evident that a lack of legal and financial resources is the largest single obstacle to such participation [of the public in the license renewal process]"; see also dissenting opinion of Commissioner Cox, *KCMC, Inc.*, 25 FCC2d 603, 606-14 (1970).

The reasons why the *Church of Christ* invitation was not accepted are not difficult to understand. The FCC, like most regulatory agencies, is surrounded by a specialized bar which serves the regulated industry; the communications bar serves station owners and the broadcast industry. Their services are priced beyond the financial reach of listener groups, and most of the specialists have conflict of interest problems — they represent broadcast industry interests and could not undertake the representation of citizen groups even if financial barriers were surmountable.

In 1966, when the *Church of Christ* case was decided, the interests of the listening public were rarely presented in the Commission. Even today there are just a handful of FCC specialists (including attorneys employed by Amicus Citizens Communications Center) who make their services available to listener groups, minorities, and others excluded from access to the media.

III
DEVELOPMENT OF ADVOCACY FOR UNREPRESENTED INTERESTS

During the past ten years, the legal profession has become increasingly sensitive to the need to structure the justice system in a manner which will assure access to the courts and regulatory agencies for all elements in the society. The development of the legal services program funded by the Office of Economic Opportunity in the mid-60's, with the active support of the American Bar Association, is one example of this commitment.[14]

Chesterfield Smith, past president of the American Bar Association, expanding on this theme, stated:

[14] See Tucker, "Pro Bono Publico or Pro Bono Organized Bar", 60 A.B.A.J. 916, 917 (1974).

> "One of the singular contributions of the common law legal system to the settlement of those disputes that must inevitably arise in human society is the adversary system. All American lawyers, whether they are trial lawyers or not, have a special interest in maintaining its viability and integrity.
>
> Recently the legal profession has come to accept as its special obligation the furnishing of legal representation to all who need it . . . .
>
> * * *
>
> "If this is so, it is vital to the continuing viability of the adversary system that remedial action be instituted in behalf of the unrepresented. There are both individuals and groups who for practical purposes are barred from the courts and from legal process generally because they lack sufficient commitment and resources to support litigation on the same scale as their adversaries. Environmental and consumer concerns are two immediate and obvious examples." *President's Page*, 60 A.B.A.J. 641 (1974).

More particularly, the responsibility of bench and bar encompasses the obligation to assure that no significant segment of the American population is excluded from the courts and administrative agencies because counsel is unavailable.

During the past five years, a group of new legal institutions, public interest law firms, have developed to fill the advocacy gap in the area where governmental regulation impinges on citizen interests. Leading members of the legal profession, such as Justice Arthur Goldberg, Francis Plimpton, Whitney North Seymour, Jr., William T.

Coleman, Abram Chayes, Clark Byse, Boris Bittker, Miles Kirkpatrick, and Anthony Amsterdam have been involved in guiding and directing new public interest law firms.

The largest single source of support for public interest law has been The Ford Foundation. Since 1970, The Ford Foundation has made grants of approximately ten million dollars to public interest firms.[15] Ford grants represent the substantial bulk, two-thirds to three-quarters, of foundation funding for public interest law.

The Ford Foundation, before embarking on its public interest law support program, established an advisory committee consisting of Whitney North Seymour, William T. Gossett, Bernard Segal, and Orison Marden. This committee helped the Foundation develop and shape its public interest law program and has provided continuing advice to the Foundation on new grants and grant renewals over the past four years.

The Foundation supported public interest law in order to promote the adversary process in cases of public importance, to provide access to the decision-making process for groups and individuals who had previously been excluded, and to improve the administration of justice. The programs were undertaken on an experimental basis, the Foundation support has gone to institutions of varying focuses and structures. Some have focused on particular subjects — like the Citizens Communications Center on the FCC, and the Natural Resources Defense Council on environmental issues. Some combined broader areas of representation with programs of clinical education of law students (Institute for Public Interest Representation, at Georgetown Law School, and the Center for Law

[15] Ford Foundation grants to assist legal projects aiding minority groups are not included in this figure. Substantial grants have been made to such groups as the NAACP Legal Defense Fund, the Mexican American Legal Defense Fund, and the Native American Rights Fund.

and Social Policy, which is affiliated with the Yale, Pennsylvania, Michigan, Stanford, and UCLA Law Schools). Others focused on local and state matters (Center for Law and the Public Interest). Some build memberships and filed suits in their own names (Natural Resources Defense Council, Environmental Defense Fund) while otheres were aligned with existing membership organizations (Sierra Club Legal Defense Fund).

An early debate on the role and legitimacy of public interest law came in the fall of 1970 when the Internal Revenue Service announced its intention to stop issuing tax exemptions to public interest law firms. Out of that discussion came a clearer recognition of the need for a vigorous adversary system and the importance of the new public interest law firms in making that system work.[16] In Congress, the IRS action was opposed by [then] Congressman Gerald Ford, Senators Sam Ervin, Edmund Muskie, Robert Packwood, and many others.[17] Russell Train, then Chairman of the Council on Environmental Quality, in urging that the IRS action be reversed, summarized the role that public interest litigation had played in the environmental field:

> "Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reinforcing government environmental protection programs.
>
> * * *

[16] Edward H. Levi, "Forward", *The Public Interest Law Firm: New Voices for New Constituencies*, p. 8 (Ford Foundation, 1973).

[17] See *Hearings on Tax Exemption for Charitable Organizations Affecting Poverty Programs Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. (1970).

> "We have observed that litigation brought by private groups which must rely on contributions for their support have performed at least three key functions in aid of our environmental protection programs:
>
> > They have strengthened and accelerated the process of enforcement of antipollution laws;
> >
> > They have identified gaps in our regulatory procedures as for example as in our pesticide controls and spurred action to remedy these gaps; and
> >
> > They have brought before the courts the public's interest in enforcement of such new governmental procedures as the Section 102 environmental impact statement requirement."[18]

At the Senate Hearings held on the IRS action, the IRS reversed its position, and began again to issue favorable rulings to public interest law firms.[19]

The impact of the new public interest law programs was substantial. To give but a few examples, there were:

Wyatt v. Aderholt, Civ. No. 72-2634 (5th Cir., November 8, 1974, *affirming in part* 344 F. Supp. 373 and 344 F. Supp. 387 (M.D. Ala. 1972) (involuntarily confined mental patients have constitutional right to treatment).

Morales v. Turman, Civ. Action No. 1948 (E.D. Tex. Sept. 3, 1974) (constitutional right to treatment and education for confined juvenile delinquents) (appeal pending).

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[18] *Id.* at 461.

[19] See Statement of Randolph W. Thrower, Commissioner of Internal Revenue, *id.* at p. 54.

Ocasio v. Klassen, 73 Civ. 2496 (S.D.N.Y., consent order entered November 25, 1974) (consent order modifying postal regulations regarding employemnt of former drug addicts).

La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D. Cal. 1971, aff'd 488 F.2d 559 (9th Cir. 1973), *cert. denied*, __U.S.__ (1974) (highway construction barred pending compliance with relocation and environmental law and regulations).

Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971) (invalidating FCC 1970 comparative hearing renewal policy).

Alabama Educational Television Commission, 33 FCC 2d 495 (1972); New York Times, September 19, 1974, p.1. (denial of Alabama non-commercial TV licenses for discriminatory program and hiring practices).

Pickus v. U.S. Board of Parole, Civ. No. 73-1987 (D.C. Cir., October 11, 1974) (Parole Board is agency subject to Administrative Procedure Act rule-making requirements).

The impact of the public interest activity was particularly clear in the environmental area. In addition to the instant case, see, *e.g.*:

Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), *aff'd sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973) (affirmance by an equally divided court) (under Clean Air Act, EPA must protect against degradation of air).

Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) (public may participate in proceeding concerning pesticide [DDT] use).

Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (environmental impact statement on offshore oil leasing inadequate for failure to examine alternatives).

Scientists Institute for Public Information v. AEC, 481 F.2d 1979 (D.C. Cir. 1973) (fast breeded reactor development program requires environmental impact statement fully assessing effects of new technology).

In its second annual report, issued in 1971, the Council on Environmental Quality stated:

> "Perhaps the most striking recent legal development has been the step-up in citizen 'public interest' litigation to halt degradation of the evnironment . . . . It has speeded court definition of what is required of Federal agencies under environment protection statutes. The suits have forced greater sensitivity in both government and industry to environmental considerations. And they have educated law makers and the public to the need for new environmental legislation.
>
> * * *
>
> What is unique about current citizen and environmental litigation is that the considerable resources, nationwide attention and judicial receptivity accorded it have created, in effect, an 'environmental ombudsman' for the Nation. Rather than creating a new public officer to challenge official action on environmental issues publicly, citizen groups are now doing it themselves — and are being effective." *Environmental Quality — The Second Annual Report of the Council on Environmental Quality*, pp. 155-56, 175. (1971).

But this new wave of citizen participation in government through the legal system will fade without an adequate financial base for legal representation. A small number of attorneys have established firms in recent years to provide

representation on a reduced fee basis to groups that had been previously unrepresented.[20] At the same time, a few large firms established *pro bono* departments in order to expand their charitable professional activity and provide representation to groups and individuals who were unable to pay their fees. See Comment, "The New Public Interest Lawyers", 79 Yale L.J. 1069 (1970). However, the involvement of the private bar in such activities has not been as widespread as had been hoped. The financial problems of the smaller new firms have been formidable, and even the larger firms have not been enthusiastic about undertaking massive cases without compensation.

IV

THE PROBLEM OF CONTINUING FINANCIAL SUPPORT FOR REPRESENTATION OF UNREPRESENTED INTERESTS

The heavy reliance of the public interest law development on foundation funding has been a matter of concern within the public interest bar and within the larger bar for some time. The preference of foundations for establishing new programs of an innovative character and then moving on to newer programs is well-known.[21] And the current economic climate will necessitate cutbacks in all foundation programs. Moreover, as public interest litigation has moved through the courts, it has become clear that the need for representation greatly exceeds the limited funds made available by the foundations. Hence, increasing attention has been given to the problem of developing funding sources which will assure the future vigor and expansion of public interest representation.

Last spring, The Ford Foundation convened a conference which brought together leaders of the organized bar, the

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[20] See Berlin, Roisman & Kessler, "Public Interest Law", 38 G.W.L. Rev. 675 (1970).

[21] See *supra*, p. 6.

public interest bar, and the foundations. It was agreed that future financing was the most critical problem facing the public interest law movement, and a Council for the Advancement of Public Interest Law, to focus on this future financing problem, was established. Membership on that council includes William Gossett, Chesterfield Smith, William Ruckelshaus, Burke Marshall, Orville Schell, Whitney North Seymour, Jr., and Mitchell Rogovin. The Council will explore and develop alternative funding sources. Availability of attorneys' fees awarded by courts in the exercise of their equitable powers will be a substantial factor in the Council's success.

The Council is supported by grants from foundations and, more significantly, by a grant of $50,000 from the American Bar Association Fund For Public Education. The commitment of the organized bar to the continuity and development of public interest law, manifested by that grant and by the ABA's Special Committee on Public Interest Practice, is extremely significant. It evinces a recognition that the legal profession has an independent obligation to assure the viability of the adversary process, without relying on the charitable impulses of private foundations.

V

THE AWARD OF ATTORNEYS' FEES

Amici urge the Court to affirm the decision of the Court of Appeals. Amici submit that the judicial process has sufficient flexibility within its doctrinal framework to assure that its courts are open to all. The allocation of the cost of litigation, including attorneys' fees, has always been viewed by equity as one of the methods open to it to affect the flow and form of litigation.[22] Moreover, it is a method which is uniquely within the control of the judiciary. The courts can

[22] *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939); *Trustees of the Internal Improvement Fund v. Greenough*, 105 U.S. 527 (1882).

evaluate on a case-by-case basis the contribution made by particular litigants, and the reasonableness of the payment requested.[23] It has its own built-in safeguard against frivolous litigation, since the party contemplating a suit knows that fees will not be reimbursed if the case is not meritorious. The Court of Appeals' exercise of its equitable powers in this case to require petitioner to pay one-half the reasonable fee of respondents' attorneys is wholly appropriate.

This Court should affirm the fee award and make it clear that attorneys' fee awards will continue to be used in the federal courts to assure access to the courts. Congress has, in a number of settings, passed laws authorizing or requiring attorneys' fee awards to successful plaintiffs who bring suit to vindicate legislative policies. While amici support such legislation, they urge the Court to recognize that the court system has independent, coordinate authority to shift the burdens of litigation in the interest of assuring that the courts and administrative agencies are open to all litigants.

The "American rule", stating that attorneys' fees in ordinary circumstances must be borne by the litigant even though he is successful in his suit, is a judge-made rule, and numerous exceptions to the rule have been carved out over time in pursuit of equitable objectives.[24]

[23] For example, Congress, the courts, and the FCC have dealt effectively with the problems of abuse in the payment of expenses in the communications area. See Section 311(c) of the Communications Act of 1934, as amended, 47 U.S.C. §311(c), limiting reimbursement of expenses to a dismissing competing applicant to an ". . . amount determined by the Commission to have been legitimately and prudently expended. . ."; *Office of Communication of the United Church of Christ v. FCC*, 465 F.2d 519, 524-27 (D.C. Cir. 1972); *KCMC, Inc.*, 25 FCC 2d 603, 613 (1970) (dissenting opinion).

[24] *Hall v. Cole*, 412 U.S. 1 (1973); *F.D. Rich Co. v. United States*, 94 S. Ct. 2157 (1974); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

Petitioners have suggested that there is no need for attorneys' fee awards in order to have cases like the instant case reach the courts. Petitioners' brief notes that the attorneys representing Respondents were salaried employees of Respondents or of public interest law firms, and that such cases "will continue to be brought, whether or not fees are awarded."

Amici submit that Petitioner misunderstands the problem. First, the instant case was brought and vigorously pursued because foundation-supported counsel were available to provide representation, but foundation support for public interest attorneys will not continue indefinitely. Second, the number of foundation-funded lawyers in this country probably does not exceed one hundred — a tiny fraction of the number that is needed. Third, the legal process should have within its own doctrines and institutions methods of assuring an effective adversary process. The award of attorneys' fees in cases involving significant public interests is just such a doctrine. The courts should not rely on the largesse of charitable foundations to cure substantial failings in the legal process.

CONCLUSION

In this brief, amici have tried to place this case in the broader context of public interest law development and to suggest this case's importance for future development within this area. By sustaining the Court of Appeals' decision, this Court would permit continuation of the common law process by which the lower courts are identifying the equitable factors which make attorneys' fee awards appropriate.

Respectfully submitted,

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Legal Action Center of the City of New York, Inc.,
Public Advocates, Inc.,
Sierra Club Legal Defense Fund

In The

Supreme Court of the United States

October Term 1974

Supreme Court U. S.
JAN 13 1975
MICHAEL RODAK, JR., CLERK

No. 73-1977

ALYESKA PIPELINE SERVICE COMPANY,

Petitioner,

vs.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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In The

Supreme Court of the United States

October Term 1974

No. 73-1977

ALYESKA PIPELINE SERVICE COMPANY,

Petitioner,

vs.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

This brief *amicus curiae* addresses the merits of the questions raised in the above-stated Writ of Certiorari. The Association of the Bar of the City of New York files this brief pursuant to Rule 42 of the Rules of the United States Supreme Court. Both petitioner and respondents have consented to the filing of this brief and copies of the consents of petitioner and respondents have been filed with the Clerk of this Court.

INTERESTS OF THE *AMICUS CURIAE*

The Association of the Bar of the City of New York ("The Association") has a membership of some 10,500 attorneys admitted to practice in New York and elsewhere. The Association was established by Act of the New York State Legislature in 1871. Laws 1871, Chapter 819; Amended Laws 1924, Chapter 134. Its stated statutory purposes are "cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession and cherishing the spirit of brotherhood among the members thereof."

Much of The Association's membership serves on specialized committees which are designed to make professional contributions in their special fields in furtherance of The Association's purposes. Among the committees with an interest in the issues presented in this Writ of Certiorari is The Association's Committee on Environmental Law, which has examined the issue on appeal herein and requested and approved the preparation of this brief *amicus curiae*. The Executive Committee of The Association has authorized the filing of this brief on behalf of The Association.

The Association believes that this Writ of Certiorari raises important implications for the hearing of environmental causes in federal courts. The central issue reviewed here is how this Court will delineate the private attorney general doctrine.

Without affirmation of the doctrine, this Court's salutory refinements in the field of standing[1] to litigate environmental rights are substantially impaired; those non-economic interests which possess a stake sufficient to sue, frequently lack the necessary financial resources simply because they are non-economic interests. A single citizen rarely has the financial capacity or willingness to vindicate environmental laws protecting widely shared resources.

The equitable foundation of the private attorney general doctrine guides its application: where a Court finds that a citizen has served as a private attorney general, fairness requires that the citizen's expenses, including attorneys' fees, in effectuating a federal law be reimbursed. Similarly, fairness requires that such expenses be paid by the party which the Court finds responsible for frustrating the given federal law's effectuation.

The Court of Appeals below was aware of these implications: ". . . our decision today may increase the willingness of skilled lawyers throughout the nation to undertake public interest litigation on behalf of unmonied clients with just, lawful, and important claims. This proposition we of course accept, and count it a happy result of our decision." *The Wilderness Society, et al. v. Morton*, 495 F.2d 1026, 1038 n. 9 (D.C. Cir., April 4, 1974).

This brief reviews the appropriateness of the private attorney general doctrine as applied to environmental law suits and the extent in equity of its application.

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1. *Sierra Club v. Morton*, 405 U.S. 727 (1972) and *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973).

SUMMARY OF ARGUMENT

The "private attorney general" is a citizen acting to enforce public policy. Equity permits an award of expenses including attorneys' fees to such a citizen when his actions effectuate a provision of the Constitution or a strong congressional policy.

This award of counsel fees is particularly appropriate in environmental litigation where citizens acting to enforce laws to protect the nation's natural resources frequently vindicate substantial public rights benefiting a broad population.

Where governmental officials do not effectuate public policy but for action by a private attorney general, the award of expenses is both just and necessary. The citizen assumes a real burden but seeks no pecuniary reward. His concrete interests, which gave him standing to sue, usually are non-economic and he can ill afford the expenses to which he has been put.

Where the elements of the private attorney general doctrine are met, the award of expenses should include all costs reasonably related to effectuating the policy, not merely those involving litigation. The measure for computing fees should be the fair market value of the services.

28 U.S.C. §2412 need not be a bar against assessing attorney's fees against the United States. Congress passed §2412 to promote fairness to those litigating with the federal government primarily for money claims. In so doing, it adopted the common law "American" rule including the equitable exceptions thereto. It is fair and just to award fees against the United States.

ARGUMENT

POINT I

THE PRIVATE ATTORNEY GENERAL DOCTRINE PROVIDES AN EQUITABLE BASIS FOR COMPENSATING CITIZENS SEEKING JUDICIAL ENFORCEMENT OF CONSTITUTIONAL OR IMPORTANT LEGISLATIVE POLICIES.

The worth of the private attorney general doctrine in American jurisprudence is amply demonstrated. The doctrine is of such proven importance that this Court should embrace it and delineate its elements to reconcile differences in the case law.[2]

---

2. This Court in *Hall v. Cole*, 412 U.S. 1 (1973), alluded to the "private attorney general" theory but did not rule with respect to it. It noted in *F.D. Rich Co. v. Industrial Lumber Co.*, 40 L. Ed. 2d 703 at 714 (1974) that whether counsel fees could be awarded to a private attorney general remained an undecided issue.

The 2nd and 4th Circuits have declined to honor the private attorney general doctine. See, *e.g.*, *Bridgeport Guardians Inc. v. Members of Bridgeport Civil Service Commission*, 497 F.2d 1113 (2d Cir. 1974); *Bradley v. School Bd. of City of Richmond*, 472 F.2d 318 (4th Cir. 1972), *rev'd on other grounds*, 416 U.S. 696 (1974). The District of Columbia Circuit and the 1st, 3rd, 5th, 6th, 7th, 8th and 9th Circuits plus some 24 district courts have accepted and applied the private attorney general doctrine. See, *e.g.*, *Knight v. Auciello*, 453 F.2d 853 (1st Cir. 1972) and *Natural Resources Defense Council v. Environmental Protection Agency*, 484 F.2d 1331 (1st Cir. 1973); *Skehan v. Bd. of Trustees of Bloomsburg State College*, 501 F.2d 31 (3rd Cir. 1974); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Milburn v. Huecker*, 500 F.2d 1279 (6th Cir. 1974); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Fowler v. Schwarzwalder*, 498 F.2d 143 (8th Cir. 1974); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974).

Among the best known applications of the doctrine to environmental causes by district courts is *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972). See also *Delaware Citizens for Clean Air v. Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974).

A synthesis of the evolution of the private attorney general doctrine in case law reveals several elements which should be considered in the exercise of judicial discretion when a Court is asked to award counsel fees based upon the doctrine:

1. The vindication of a substantial legal right arising under federal law. Such includes any one of the following:

> a. The effectuation of any provision of the Constitution of the United States of America;
>
> b. The effectuation of a strong congressional policy. Strong may be construed as being of substantial importance in light of (i) the major public policies as declared in legislative findings embodied in a law's legislative history, (ii) the function of the law as an integral part of a legislatively-framed regulatory scheme, (iii) the substantial injury which would result to the citizenry or any class of citizens whose interests are protected by the law.

Effectuation in each instance must be judged in terms of the law being duly implemented by the officials sued whenever such occurs and not merely because a party wins, settles or loses a lawsuit or administrative proceeding in the attempt to secure effectuation.

2. The failure of administrative officials to honor a substantial legal right and/or press for its effectuation.

3. The extent of the public benefit realized by the effectuation.

4. The financial or other burden assumed by the citizen in securing the effectuation. This element should include all aspects of the citizen's undertakings which directly relate to securing effectuation and not merely the expenses and counsel fees involved in any final court ruling which requires effectuation especially in comparison with the often substantial economic resources and expertise of governmental bodies and private corporate party defendants.

5. The presence of any special circumstances which would render unjust an award of expenses and attorneys' fees.

The availability of counsel fees, where justified by these elements, is crucial to assuring that individuals injured by a failure to effectuate a federal law are encouraged to seek judicial relief. Equity supplies here what a statutory scheme may not as yet provide. See Note, *Allowance of Attorney Fees in Civil Rights Litigation Where the Action Is Not Based on a Statute Providing for an Award of Attorney Fees*, 41 Cinn. L. Rev. 405 (1972). As discussed below, the private attorney general doctrine is particularly apt in environmental suits.[3]

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3. Indeed the success of environmental litigation has spawned several statutes expressly providing attorneys' fees in environmental litigation. In environmental laws adopted since 1970, Congress has come to recognize the need to provide for counsel fees: water act citizen suits, P.L. 92-500 §505; 33 U.S.C. §1151 *et seq.*; clean air act citizen suits, P.L. 91-604 §304, 42 U.S.C. §1857, *et seq.*; noise control act citizen suits, P.L. 92-574 §12. Other jurisdictions have come to the same conclusions, see *e.g.*, Air Pollution Control Code, Administrative Code of The City of New York, Ch. 57, Part 2; Local L. No. 14, 1971, as amended, and Noise Code, Administrative Code of The City of New

(Cont'd)

In a recent civil rights ruling awarding attorneys' fees, the 6th Circuit Court of Appeals observed in *Taylor v. Perini*, 503 F.2d 899 at 905 (6th Cir. 1974):

> "Awarding attorneys' fees in cases where there is no potential substantial award of damages and where the cost of supporting a case for injunctive relief is high serves to prevent unjust discouragement of parties in bringing suits to vindicate important rights. *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974) (en banc)."

Equity is not given in halves. Where the Constitution allows suit because of the "concrete adverseness" of the parties [4] and that suit effectuates a constitutional or strong legislative policy, the private attorney general in fairness should be compensated for his expenses and fees.

(Cont'd)

York, Ch. 57, Part 3; Local L. 57, 1972, authorizing awards of counsel fees. The importance of awarding fees to encourage effectuating environmental laws has been legislatively recognized since 1970, the year of the first "Earthday," but even where no statutory scheme exists, as with NEPA (adopted before 1970), the encouragement is needed.

4. *Flast v. Cohen*, 392 U.S. 83, 99 (1967).

POINT II

THE PRIVATE ATTORNEY GENERAL DOCTRINE SHOULD APPLY TO ENVIRONMENTAL LITIGATION SINCE CITIZEN SUITS ARE OFTEN THE ONLY MEANS OF ENSURING EFFECTUATION OF ENVIRONMENTAL PROTECTION LAWS.

A. The Necessity of Citizen Environmental Suits Is Established.

Over the past decade, protection of the environment has newly emerged as a principal task of government. The need for such protection initially was pressed and recognized in federal courts. Laws previously enacted have been reconstrued in terms of the public purposes served by environmental protection.[5] New laws have been adopted touching every aspect of environmental protection.[6]

The enactment in 1969 of the National Environmental Policy Act, 42 U.S.C. §4321 ("NEPA"), actually was anticipated in 1965 by the ruling in *Scenic Hudson Preservation Conference*

5. See, for instance, the interpretation of "dike" in *Citizens Committee v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*., 425 F.2d 97 (2d Cir. 1970), *cert. denied*, 400 U.S. 949 (1970); or of the Mineral Leasing Act of 1920, 30 U.S.C. §181, *et seq*., treated on the merits in the instant case, *The Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917 (1973).

6. In addition to the pervasive National Environmental Policy Act, 42 U.S.C. §4321, water, 33 U.S.C. §1151, air, 42 U.S.C. §1857, noise, P.L. 92-574 and a host of other laws exist. See generally, *Statutory and Administrative Materials*, IV, Environmental Law Reporter, 40,000, *et seq*.

v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). The Court required an environmental protection review under the Commission's existing authority.[7] Judicial recognition of environmental injuries has prompted much remedial legislation; in the instant case, it was after the plans for the Trans-Alaska Pipeline were revised to assure environmental protection that Congress authorized the pipeline's construction, and only then with special provisions for "environmental protection."[8]

7. In *Scenic Hudson*, 354 F.2d 608 at 624, the Court noted that on remand the renewed proceedings of the Federal Power Commission "must include as a basic concern the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered. The record as it comes to us fails markedly to make out a case for the Storm King project on, among other matters, costs, public convenience and necessity, and absence of reasonable alternatives." Compare this judicial mandate with the legislative command of NEPA which requires in 42 U.S.C. §4332 that *all agencies* of the federal government:

> "(B) identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economical technical considerations; [and] . . . (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . (iii) alternatives to the proposed action."

8. See amendments to the Mineral Leasing Act of 1921 in P.L. 93-153, 87 Stat. 576, §28(h)(2):

> "(2) The Secretary or agency head, prior to granting a right-of-way or permit pursuant to this section for a new project which may have a significant impact on the environment, shall require the applicant to submit a plan of construction, operation, and rehabilitation for such right-of-way or permit which shall comply

(Cont'd)

Environmental laws have required effectuation by citizen suit either because the laws themselves lack self-enforcement mechanisms or because the interests protected are so broad that governmental officials neglect them.

The importance of citizen action as an enforcement mechanism is well illustrated by NEPA, which required all federal agencies to determine the environmental consequences of government action but was silent as to the results of their failure to do so. Only citizens affected by that failure could ensure that NEPA's policy would be implemented. Indeed NEPA may have contemplated this in recognizing that "each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. §4331(c).

(Cont'd)

> with this section. The Secretary or agency head shall issue regulations or impose stipulations which shall include, but shall not be limited to: (A) requirements for restoration, revegetation, and curtailment of erosion of the surface of the land; (B) requirements to insure that activities in connection with the right-of-way or permit will not violate applicable air and water quality standards nor related facility siting standards established by or pursuant to law; (C) requirements designed to control or prevent (i) damage to the environment (including damage to fish and wildlife habitat), (ii) damage to public or private property, and (iii) hazards to public health and safety; and (D) requirements to protect the interests of individuals living in the general area of the right-of-way or permit who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes. Such regulations shall be applicable to every right-of-way or permit granted pursuant to this section, and may be made applicable by the Secretary or agency head to existing rights-of-way or permits, or rights-of-way or permits to be renewed pursuant to this section."

Indeed, the agency overseeing implementation of NEPA, the Council on Environmental Quality ("CEQ") early endorsed such citizen action. Russell E. Train as Chairman of the CEQ stated in 1970 that "In our view, and in the view of our Legal Advisory Committee, private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reinforcing government environmental protection programs."[9]

However, suits supplementing government programs have not proven sufficient. The neglect by government officials of broad environmental interests too frequently results in frustrating a constitutional or statutory provision and injuring the protected interests. Citizens cannot rely on the Department of Justice to compel effectuation of such a provision because the Department is defending the very officials which have defaulted in their duty.[10]

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9. Letter dated September 30, 1970, by Russell E. Train, Chairman, C.E.Q., to Randolph W. Thrower, Commissioner, Internal Revenue Service, urging the IRS to rule eligible under Section 501(c)(3) of the Internal Revenue Code those entities which may pursue environmental protection goals through litigation. The IRS subsequently determined in favor of eligibility.

10. See Note, 58 Cornell L. Rev. 1222 at 1244, discussing *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972)

> "The court found that public-interest actions by concerned citizens are inherently valuable. Indeed, the court argued that private policing actions become a virtual necessity when the public officials charged with protecting the public's environmental rights ignore their constitutional or statutory duties."

When citizens sue to vindicate an environmental right, they undertake a public calling. The rights are not easily quantifiable in money terms and no single citizen usually has a sufficient economic stake in environmental protection of wildlife, public lands, rivers or air to motivate him to underwrite the entire suit. The benefits from such suits accrue to all the people.

The standing which citizens have been granted in order to bring environmental suits may be of little value if they must bear the whole financial burden of vindicating environmental rights. The award of counsel fees may be necessary to assure that the public interest will be adequately represented during the effort to secure effectuation, *Greene County Planning Bd. v. F.P.C.*, 455 F.2d 412, 426 (2d Cir. 1972). However, this may be, it is certainly the case that attorneys' fees should be awarded after successful effectuation, regardless of who "wins" the lawsuit.

B. The Public Benefits From Vindicating Environmental Rights Are Substantial.

The validity of these general conclusions is established by repeated judicial determinations where citizens vindicate environmental rights. Each of the following cases illustrates the public benefits achieved by citizens. In three instances, citizens sued through their local government; in the balance, through non-governmental civic societies. In none were money damages sought, and each imposed a substantial litigation burden on the plaintiffs.

1. Land Use

In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), a public park was saved from being bisected by a highway which would have destroyed a substantial portion of the park. The Court found the Secretary of Transportation had acted in violation of the Department of Transportion Act of 1966[11] and the Federal-Aid Highway Act of 1968.[12] This Court declared that "protection of parkland was to be given paramount importance," 401 U.S. at 412, reinforcing the congressional mandate that public parks not be destroyed if feasible and prudent alternatives exist.

In *Minnesota Public Interest Research Group v. Butz*, 358 F. Supp. 584 (D. Minn. 1973), the Court enjoined the logging and sale of timber from virgin forests in the Boundary Waters Canoe Area under the National Wilderness Preservation System Act of 1964[13] until a Management Plan and environmental impact statement were prepared. It thereby effectuated Congress' intent to minimize environmental damage.

In the instant case, itself, *Wilderness Society v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970), the Court ensured that NEPA would be followed in governmental approval of a pipeline which would transgress the nation's largest untrammelled public lands. In *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917 (1973), the issuance by the Secretary

11. 49 U.S.C. §1653(f).

12. 23 U.S.C. §138.

13. 16 U.S.C. §1131.

of the Interior of rights-of-way to build the pipeline was successfully challenged because of his violation of the language and the existing policy of the Mineral Leasing Act of 1920[14] and the Bureau of Land Mangement's regulations.

Although compliance with NEPA was not involved in the decision of the Court of Appeals, 479 F.2d 842, that federal law had been substantially effectuated by the suit.

2. Pesticides

Despite the known hazards of DDT, both the Secretary of Health, Education and Welfare and the Secretary of Agriculture refused to suspend its use. As a result of their inaction, the Environmental Defense Fund litigated in the public's behalf. *Environmental Defense Fund v. United States Department of Health, Education and Welfare*, 428 F.2d 1083 (D.C. Cir. 1970); *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

The Courts found that continued governmental approval of the use of DDT, despite its hazardous nature, was contrary to law[15] and ordered that its use be discontinued pending scientific study and public hearings.

14. 30 U.S.C. §185 (1970).

15. 1958 Amendments to the Food, Drug and Cosmetic Act, 21 U.S.C. §301 *et seq.* and Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §135 *et seq.* (1964).

3. *Water*

Many cases have sought to preserve the natural beauty and aquatic resources of the Hudson River, one of our nation's most beautiful waterways called by Mr. Justice Holmes more than an amenity, a "treasure."[16]

One suit was initiated because the Federal Power Commission issued a license to Consolidated Edison Company of New York, Inc. to construct a pumped storage hydroelectric project on the Hudson River at Storm King Mountain without considering recreational uses, including scenic beauty, as obligated to do under the Federal Power Act.[17] *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

A second challenged a permit granted by the Army Corps of Engineers to New York State to fill a section of the Hudson River to build a proposed Hudson River Expressway. In *Citizens Committee for the Hudson Valley* v. *Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd.*, 425 F.2d 97 (2d Cir. 1970), *cert. denied*, 400 U.S. 949 (1970), the District Court found that the Corps of Engineers had exceeded its authority in issuing the permit in violation of the Rivers and Harbors Act of 1889.[18] The consent of Congress was required.

16. *New Jersey* v. *New York*, 283 U.S. 336 at 342 (1931): "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."

17. 16 U.S.C. §791(a) *et seq.*

18. 33 U.S.C. §401.

The refusal of the executive to allot full sums authorized to be appropriated by Congress to municipal sewage treatment projects was challenged by citizens suing through their local government. *City of New York* v. *Train*, 394 F. 2d 1033 (D.C. Cir. 1974) affirming *City of New York* v. *Ruckelshaus*, 358 F. Supp. 669 (1973). The Court found that the Environmental Protection Agency Administrator was in violation of the Federal Water Pollution Control Act Amendments of 1972[19] and directed allotment of the full sums authorized by Congress. These suits effectuated Congress' intent to eliminate discharge of pollutants into the nation's navigable waters.

4. *Air*

Cleaning the nation's air received high priority in the Clean Air Act Amendments of 1970.[20] Despite Congress' intent "to protect and enhance the quality of the Nation's air,"[21] the Environmental Protection Agency issued a regulation[22] which would have permitted degradation of clean air. Citizen suit ensured that the intent of Congress would not be so blatantly disregarded. *Fri* v. *Sierra Club*, 412 U.S. 541 (1973).[23]

19. 33 U.S.C. §1251 *et seq.*

20. 42 U.S.C. §1857 *et seq.*

21. 42 U.S.C. §1857, §101(b).

22. 40 C.F.R. 51.12(b).

23. Although new regulations from the U.S. Environmental Protection Agency have raised anew the issue of non-degradation of the nation's clean air resources.

5. Environmental Protection — NEPA

In *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), the Court ruled that NEPA required the Atomic Energy Commission to make a fully independent evaluation of environmental impact. See also *Scientists Institute for Public Information v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973).

In *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412 (2d Cir. 1972), the court found that NEPA requires that federal agencies consider environmental values at every stage of their deliberations. Further, each agency has a primary and non-delegable responsibility for compliance with NEPA and could not abdicate its duties by using an environmental impact statement prepared by a nonfederal agency. This teaching is re-emphasized in *Conservation Society v. Secretary*, — F.2d — (2d Cir. Dec. 11, 1974, Docket 73-2629).

Further implementation of NEPA resulted in protecting the aesthetic, recreational, marine and wildlife resources of the Gulf of Mexico when suit was brought against the Secretary of Interior to enjoin him from entering an oil and gas general lease sale of submerged lands off eastern Louisiana. *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

The pattern of these cases can be repeated many times over. While a Court may not find it appropriate to apply the private attorney general doctrine in every instance to cases such as those described here, the general aptness of the doctrine is plain. This

Court should provide that environmental as well as civil rights and other public rights litigation is the genre for which the doctrine in the main exists.

POINT III

THE CRITERIA OF EXPENSES AND COUNSEL FEES UNDER THE PRIVATE ATTORNEY GENERAL DOCTRINE SHOULD BE THE MARKET VALUE THEREOF.

Once a Court rules that a citizen has served as a private attorney general, all expenses reasonably related to securing effectuation of the federal law should be reimbursed. These normally might include participation in and exhausting administrative proceedings prior to suit and the preparation for and prosecution of the suit itself.

Expert witness fees and expenses should be allowed, especially where, as in environmental causes, complex scientific or technical problems of proof are presented.[24] Since the expert and administrative costs can be quantified, they should be reimbursed.

Counsel fees also should be reimbursed. Here the issue, in proper cases, is not so much whether to reimburse, but in what amount.

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24 As was observed by the trial court in *La Raza Unida v. Volpe*, 57 F.R.D. 94, 102 (N.D. Cal. 1972): "The affidavits of the expert witnesses were quite helpful to the Court, and were a crucial part of the plaintiff's presentation."

The District of Columbia Circuit below sensibly ruled that the award of counsel fees should be based on the fair market value for the legal services rendered.[25] Courts should not engage in law office management to fix a fee otherwise.

This reasonable formula contrasts with the ruling in the First Circuit that counsel fees should be awarded at less than a fair market fee. In *Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 484 F.2d 1331 at 1337 (1st Cir. 1973), the court held, after its ruling on the merits described above, 478 F.2d 875, that:

> "Petitioners are not a public agency and are legally responsible to no one but themselves. We must satisfy ourselves that the taxpayers' money will not be used to support needless or excessive legal items. . . . As attorneys for involuntary

25 "The fee award need not be limited, however, to the amount actually paid or owed by appellants. It may well be that counsel serve organizations like appellants for compensation below that obtainable in the market because they believe the organizations further a public interest. Litigation of this sort should not have to rely on the charity of counsel any more than it should rely on the charity of parties volunteering to serve as private attorneys general. The attorneys who worked on this case should be reimbursed the reasonable value of their services, despite the absence of any obligation on the part of appellants to pay attorneys' fees . . . . It is our view that the award must go to counsel rather than to the organizations which pay their salaries . . . . This is sound, whether such organization is a litigating party or a public interest law firm or defense fund . . . and we revert to the possibility that the salary they previously received represented less than they could have earned on the market in the absence of their dedication to the public interest." *Wilderness Society v. Morton*, 495 F.2d 1026 at 1037 (D.C. Cir. 1974).

> clients, their fees may properly be less than those they would have received by entering the marketplace and selling their services to the private client who would make the highest bid for them."

In this suit *against* the Environmental Protection Agency to force implementation of the Clean Air, a *"pro bono"* reduced rate of $30 an hour for private counsel, and a pro rata share of the salaries of staff counsel for the Natural Resources Defense Council, Inc. were fixed.

In the Second Circuit, without a written opinion, the same formula was used in *Hudson River Fishermen's Association v. Federal Power Commission*, — F.2d — (2d Cir., 1974) (Docket Numbers 73-2258 and 73-2259) (a suit under 16 U.S.C. 803(a) and NEPA). The trial court in *Sierra Club v. Lynn*, 364 F. Supp. 834 (W.D. Tex., San Antonio Div., 1973), *rv'd on other grounds*, 504 F.2d 43 (5th Cir., 1974), *rehearing den.* 504 F.2d 760 (5th Cir., Nov. 19, 1974, en banc), adopted the fee schedule of the Criminal Justice Act, 18 U.S.C. 3006A(d).

The only fully equitable test is not any one of these formulae. Any equitable formula must be framed uniformly. It should remain that which is reasonable in the circumstances guided by the following considerations:

a. Market costs for attorneys' fees (including their overhead) in the community where the forum is located.

b. The hours devoted by counsel and any special skills required.

c. The fair value of para-legal assistance and overhead and expert witness and consultants services provided to make the legal representation possible.

d. The services rendered, including counsel's success in asserting different legal contentions, the relationship of those contentions to the federal law effectuated, and the benefits conferred by enforcing the law.

POINT IV

EQUITY MAY AWARD ATTORNEYS' FEES AGAINST THE UNITED STATES AND ITS AGENCIES.[26]

The private attorney general doctrine only achieves its equitable end of making the plaintiff whole if the expenses and attorneys' fees can in fact be paid.

Where local government, *e.g. Bradley v. School Bd. of Richmond*, 53 F.R.D. 28 (E.D. Va. 1971), 472 F.2d 318 (4th Cir., 1972), *vacated and remanded*, 416 U.S. 696 (1974), or state agencies, *e.g. Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala., 1972) are sued, courts have taxed them to reimburse the private attorney generals.

The instant case raises a troubling aspect of how the doctrine is to be applied. Alaska, an intervening defendant, had not been found responsible for frustrating federal law and was

26. If this Court rules that a Court sitting in equity cannot award counsel fees against the United States, the only remedy for the inequity which results is a congressional amendment to recognize the common law doctrine of the private attorney general. For the reasons here stated, further legislation is not required.

not taxed. Alyeska, similarly situated like Alaska, was taxed. The United States Department of the Interior, whose officials were deemed responsible for frustrating the federal policy, was not taxed because of 28 U.S.C. §2412.

However, equity is not served by a doctrine which unfairly taxes private applicants which are *not* found to have unduly influenced or caused the government officials' improper acts. If Alyeska is not to be taxed, is the United States immune as assumed below?

La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal., 1972), escaped the dilemma raised here by taxing the State. In *Sierra Club v. Lynn*, 364 F. Supp. 834 (W.D. Tex., San Antonio Div., 1973) fees were assessed against the private developer and the unfairness of this ruling caused its reversal on appeal, 504 F.2d 43 (5th Cir., 1974).

Where a federal defendant frustrates federal law, the award of expenses under the private attorney general doctrine should be taxed against the United States. Although lower courts have neglected serious study of 28 U.S.C. §2412, the equities of an award in the instant case require review of the equitable grounds for ruling that 28 U.S.C. §2412 is not a bar to an award.

The question of awarding attorneys' fees against the United States was but briefly considered by the Court below:

> ". . . Under 28 U.S.C. §2412, however, no attorneys' fees can be imposed against the United States. . ." 495 F.2d at 1036.

More consideration should be given to its purpose; and equitable aspects should be thoroughly examined.

A. The History of 28 U.S.C. §2412 Shows No Restriction on Equitable Exceptions to the "American Rule."

Historically, the sovereign has been immune from suit. Traditionally, with rare exceptions such as those now before this Court, awards of attorneys' fees in Federal courts have been denied to successful litigants — *i.e.*, the "American" rule.

As a matter of fairness, primarily for damage claims, sovereign immunity was waived by Congress. However at the time Congress waived immunity, it did not permit awards of fees or costs. The *former* statute, passed in 1948, read:

> "(a) The United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress." (former 28 U.S.C. §2412, 62 Stat. 973, June 25, 1948).

Inequality resulted. No award of costs could be had *against* the United States, but, if successful, the United States could be awarded costs.

So, in 1966, Congress amended §2412:

> "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or official of the United States acting in his official capacity, in any court having jurisdiction of such action . . ." (P.L. 89-507, July 18, 1966).

The purpose of this amendment was ultimate fairness: to put the United States on an equal footing with other litigants. The purpose was not to prohibit attorneys' fees in unusual situations, because the "American" rule made it unnecessary for Congress to examine awards of attorneys' fees in suits for money judgments in claims against the United States.

The legislative history of the 1966 amendment shows that Congress' desire for fairness was a two-way street. Although the reasons can be inferred, the legislative history does not explicitly state why awards of attorneys' fees were — in words, if not in spirit — disallowed.

Senate Report No. 1329 speaks to the issue of fairness:

> ". . . [these bills] are intended to improve the procedures for disposition of claims by and against the Government. These four bills have the common purpose of amending the law to incorporate features which will provide for a more fair and equitable treatment for the private individual or claimant when he must deal with the Government.

> ". . . this bill will provide for uniformity of treatment in the award of costs. Apparently the present inequality is related to a governmental advantage derived from the principle favoring immunity of the sovereign from suit. *Under modern conditions, there is no reason for this advantage when the law provides for suit against the Government.*" 1966 U.S. Code Cong. & Admin. News 2527 at 2528. (Emphasis supplied.)

Although the Report said that there was no change as to attorneys' fees, this was probably because Congress knew that the "American rule" applied generally, and there was no need to reconsider it or its equitable exceptions. Fairness to litigants with money claims against the United States was the only issue. How often, if ever, could a *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939) fund situation be anticipated in government litigation? Suits customarily had been for damages; judicial recognition of non-econonmic interests sufficient to confer standing to sue remained several years away. Congress understandably had no occasion to probe the matter deeply.

In short, it appears that Congress simply sought to codify the common law rule on attorneys' fees, including its several equitable exceptions. Congress did not abridge the Court's authority to award attorneys' fees in equity proceedings.

28 U.S.C. §2412 has not been a complete bar to awards of attorneys' fees. *Thorn v. Richardson*, 4 C.C.H. Employment Practices Decisions, Para. 7630, at 5489-5492 (W.D. Wash., Dec. 10, 1971). The evolution of §2412 was also noted in *dicta* in

Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 484 F.2d 1331, at 1335, note 3 (1st Cir. 1973):

> "The legislative history provides no clues concerning Congress' reasons for broadly excluding awards of attorneys' fees. Such a result might seem to be inconsistent with the express desire to eliminate the 'unfair' advantage possessed by the United States by virtue of its sovereign immunity. At the time of the enactment, however, the award of fees was still rare in American law and was often disfavored by the courts. *See, e.g., Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967). The omission may simply have been a reflection of the prevailing American rule, preserving to Congress the option of reversing the rule when justice required."

The First Circuit had no need further to consider §2412, for it found the necessary Congressional authorization for fees in the Clean Air Act itself. By analogy, unless expressly curbed by Congress, comparable authorization persists in equity. Cf. The similar construction discussed in *Pyramid Lake Paiute Tribe v. Morton*, 360 F. Supp. 669, 670-71 (D.D.C., 1973).

B. The Court's Equitable Power Permits Awards of Attorneys' Fees Against the United States.

Equity has the power to promote the fairness suggested by the legislative history of 28 U.S.C. §2412 in accordance with the development of the common law awards of attorneys' fees under such equitable exceptions to the "American Rule" as the private attorney general doctrine.

Courts of equity have broad jurisdiction to make and enforce orders to protect the public interest and effectuate statutory purposes. As stated in *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960):

> ". . . [Congress] must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature' *Clark v. Smith*, 13 Pet. 195, 203."

This Court has declined to find that Congress restricts equity authority by implication. *Renegotiation Board v. Bannercraft Clothing*, 42 U.S.L.W. 4203 (1974). See also *Porter v. Warner Co.*, 328 U.S. 395 (1946).[27]

27. This Court's "equitable jurisdiction is not to be denied or limited in the absence of *a clear and valid legislative command*. Unless a statute in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395 at 398 (1946) (emphasis added). At issue of course, is whether the "legislative command" of §2412 included the equitable exceptions to the American Rule.

A question of statutory interpretaion of intent arose in *Beley v. Naphtaly*, 169 U.S. 353 (1898). There, this Court construed a statute in accord with what it believed had been Congressional intent:

> "The Act of Congress should not be so construed as to except from its remedial powers those who were without an actual grant while at the same time filling every other requirement of the Act, unless the language of the Act is open to no other interpretation.
>
> "'Such a construction ought to be put upon a statute *as will best answer the intention which the makers had in view. . . .*'" (Emphasis supplied.) *Cf. Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

See also *The Allocation of Attorneys' Fees after Mills v. Electric Auto-Lite Co.*, 38 U. Chic. L. Rev. 316 (1971).

In the case of §2412, the intention was *fairness*. It was expressed in the best manner Congress knew at the time. Furthering that intention means that the "American" rule, as it develops with its equitable exceptions, is to be applied in actions involving the United States and its agencies.

The situation is analogous to Civil Rights Act and Clean Air Act rulings, where the courts found a basis for assessing attorneys' fees against the United States without express provision in the statutes. Here, where a citizen's "concrete

adverseness"[28] gives him standing to sue and he satisfies the private attorney general elements, equity should also embrace an award against the United States. The United States and its agencies are subject to a court's equitable injunctive orders. They are likewise subject to equitable awards of attorneys' fees.

28. *Flast v. Cohen, supra.*

CONCLUSION

This Court should recognize and delineate the private attorney general doctrine as set forth above, and the doctrine should be deemed applicable to environmental litigation.

It is inherently unfair to burden a private attorney general for successfully effectuating a Congressional policy without reimbursing him for his attorneys' fees and other expenses. It is similarly unfair to assess fees wholly against a private party when a federal official is at fault. The fees should be assessed against the United States as well.

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